



**THE LAW REFORM COMMISSION  
OF WESTERN AUSTRALIA**

**Project No 87**

**The Evidence of Children and  
Other Vulnerable Witnesses**

**DISCUSSION PAPER**

**APRIL 1990**

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This Discussion Paper was prepared with the special assistance of Marion Dixon, formerly Lecturer in Law at the University of Western Australia. The Commission is much indebted to her for her valuable work on the reference.

## **Preface**

The Law Reform Commission has been asked to review the law and practice governing the giving of evidence in legal proceedings by children and other vulnerable witnesses.

The Commission has not formed a final view on the issues raised in this discussion paper and welcomes the comments of those interested in the topic. It would help the Commission if views were supported by reasons.

The Commission requests that comments be sent to it by 29 June 1990.

Unless advised to the contrary, the Commission will assume that comments received are not confidential and that commentators agree to the Commission quoting from or referring to their comments, in whole or part, and to the comments being attributed to them. The Commission emphasises, however, that any desire for confidentiality or anonymity will be respected.

The research material on which this paper is based can be studied at the Commission's office by anyone wishing to do so.

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# Chapter 1

## INTRODUCTION

### 1. THE TERMS OF REFERENCE

1.1 The Commission has been asked to review the law and practice governing the giving of evidence in legal proceedings by children and other vulnerable witnesses.

### 2. BACKGROUND TO THE REFERENCE

1.2 Some, if not most, of the incentive for this review arises out of the growth in public awareness of and concern about sexual abuse of children. A Western Australian Government Task Force reporting in December 1987 on Child Sexual Abuse found that "the law regarding the evidence of children presents difficulties in cases of child sexual abuse, since very often there is no physical evidence of the abuse and it is frequently difficult to present other evidence that corroborates a child victim's testimony".<sup>1</sup> A further difficulty mentioned in that report was the finding that most sexual offences against children were committed by persons known to the child and either members of the child's family or otherwise in a position of authority and trust, a factor which inhibited the giving of evidence by child witnesses.

### 3. OBSTACLES TO SUCCESSFUL PROSECUTION OF CHILD ABUSE OFFENDERS

1.3 The Task Force found that among the obstacles to successful prosecution in cases of child sexual abuse were certain aspects of the law of evidence, in particular:

- \* the rule that the unsworn evidence of a child under 12 years cannot lead to a conviction for an offence in the absence of corroborating evidence;<sup>2</sup>
  
- \* the special rules requiring corroboration in respect of certain "offences against morality" against women or girls;<sup>3</sup>

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<sup>1</sup> Child Sexual Abuse Task Force *A Report to the Government of Western Australia: Summary* (1987) 3.

<sup>2</sup> *Evidence Act 1906* s 101(2).

<sup>3</sup> Criminal Code 1913 ss 185, 187, 188 and 192 and the *Evidence Act 1906* s 37. The requirement of corroboration in ss 185, 187 and 192 of the Criminal Code has since been abolished by s 31 of the

- \* the general requirement that, like all other witnesses, children must give evidence in open court and in the presence of the offender;
- \* the competency requirement that in order to give unsworn evidence a child under 12 should be "possessed of sufficient intelligence" to justify the reception of the evidence<sup>4</sup> - a requirement not imposed on other (adult) prospective witnesses who do not understand the nature of or the obligation imposed by a formal oath.<sup>5</sup>

The Task Force accordingly recommended changes to the law of evidence to alleviate these problems.<sup>6</sup>

1.4 The assumption is that successful prosecutions (ie prosecutions resulting in a conviction) are desirable, and that weakness in law enforcement is an evil. However, in the case of certain matters where children may be called on as witnesses, such as cases of child sexual abuse, the community interest in law-enforcement - that is, in conviction and punishment of the offender with the aim of deterring both the offender and others from committing similar offences - may perhaps not be consistent with the best interests of the particular child victim or witness from a psychological standpoint because of the trauma associated with the giving of evidence.

#### **4. SCOPE OF THE REFERENCE**

1.5 It is against this background that the Commission is required to review the law and practice governing the giving of evidence by children. The terms of reference of the Commission's task go beyond the evidence of children, however, to include "other vulnerable witnesses". Thus the scope of the reference allows consideration of the need for reforms to accommodate any witnesses for whom the giving of evidence may be especially traumatic - such as, perhaps, the elderly, the handicapped and some victims of adult sexual offences.

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*Criminal Law Amendment Act 1988*. The requirement in s 188 has been eliminated by a new s 188 inserted by s 21 of the 1988 Act. S 37 of the *Evidence Act* has been repealed by s 40 of the 1988 Act.

<sup>4</sup> *Evidence Act 1906* s 101(1).

<sup>5</sup> Id s 100A.

<sup>6</sup> Child Sexual Abuse Task Force *A Report to the Government of Western Australia* (Dec 1987).

1.6 Although the recent concern about child witnesses has arisen chiefly in the context of child abuse where the child witness has been a victim, there are of course many situations in which a child may be called as a witness. A child may have been a "spectator" and be called to give evidence of events in which he or she played no part, whether these gave rise to a criminal prosecution or to a civil suit. Or the child may be the plaintiff (through his or her guardian or equivalent) in an action for damages arising out of a breach of contract or tortious conduct such as negligence. It must be borne in mind that some of the reforms under consideration in this paper (such as those relating to competency, corroboration and education of legal personnel) would apply to *all* child witnesses in whatever context. Other reforms, because of their nature and purpose, would probably be confined to victims of intra-familial child abuse, but might apply to some adult witnesses with special characteristics that mark them as vulnerable in ways similar to young children.

1.7 In looking at the problems that may be associated with the giving of evidence by children and other vulnerable witnesses, the Commission distinguishes two broad questions that require to be addressed:

(a) *Alleviating trauma*

If the experience of giving evidence in legal proceedings is especially traumatic for any witness, what are the sources of harm and what may be done to alleviate the harm caused to the witness?

(b) *Improving the quality of evidence*

How may the capacity of children and other vulnerable witnesses to give reliable evidence be enhanced for forensic purposes by alterations in the existing law and practice of evidence?

1.8 In raising issues for discussion at the end of this Paper, the Commission has chosen to formulate proposals rather than to ask open-ended questions. This is not to be taken as an indication that the Commission has formed fixed views on any of these issues or that the proposals form a "scheme" which must be accepted or rejected as a whole. The Commission welcomes comment on the details of individual proposals as well as on the general thrust of any proposal.

## **Chapter 2**

### **THE PROBLEM OF THE CHILD AS A WITNESS**

#### **1. CHILDREN A SPECIAL CLASS OF PERSONS IN LAW**

2.1 Traditionally children, because of their immaturity, have been treated as a special class of persons requiring different treatment in law from adults. On the one hand, this has meant that children enjoy special protection: for instance, young children are not criminally responsible for their acts and cannot be held personally accountable for breach of contract or the law of torts; and, in matters specially affecting their welfare, the law enjoins the courts to treat the child's interests as paramount. On the other hand, the immaturity of children has led the legislature to restrict the sorts of activities children may lawfully enter into. They may not drive before the age of 17, drink before they turn 18, or buy cigarettes under the age of 16. If female children have sexual intercourse while under the age of 16 their sexual partner commits a criminal offence, and so on.

2.2 The age at which children may lawfully enter into certain activities or be held responsible for their conduct varies according to the activity because the law recognizes that children's gradually developing maturity gives them different capacities at different ages. In some individual cases the prescribed ages will appear quite arbitrary and inappropriate. For instance, the age at which a minor may acquire a driver's licence could be thought wholly unsuitable for a large number of young people. But the law is required to establish a general rule because of the practical impossibility of assessing every individual case on its merits.

2.3 When it comes to the question of determining whether and when children should give evidence in court, much the same questions arise and considerations apply - namely, at what age should children be permitted or required to give evidence, and what special rules, if any, should be introduced to cater for their immaturity?

## 2. DEFINITION OF A "CHILD"

2.4 In general terms a "child" is anyone under the age of majority, which in Western Australia is 18.<sup>1</sup> This means that, under the common law, a person under the age of 18 must be assessed for competency to take the oath. However, since section 101 of the *Evidence Act 1906* dealing with the unsworn evidence of children refers only to children under the age of 12,<sup>2</sup> for practical purposes children 12 years and over are presumed to be competent witnesses and are, like adults, able to give evidence without an oath or affirmation if unable to understand the nature of or obligation imposed by an oath or solemn affirmation but nevertheless able to understand the duty to speak the truth.<sup>3</sup> The unsworn evidence of a child over 12 years of age is not subject to the special rules requiring corroboration of a child's unsworn evidence.

2.5 Under the *Child Welfare Act 1947* a "child" generally also means any boy or girl under the age of 18 years. However, for the purposes of the "alternative procedure" applicable to proceedings involving a child witness, a child is defined as a person under the age of 16 years.<sup>4</sup>

## 3. BALANCING COMMUNITY INTEREST AND THE WELFARE OF THE CHILD

2.6 There are two opposing principles which tend to operate where the evidence of children is concerned. The first of these is the community interest in seeing justice done. In the sphere of crime this will generally mean that offenders should be prosecuted and punished for their crimes, but only after a fair trial which adheres to fundamental rules of justice. The second, conflicting, consideration is the welfare of the child, which may dictate that the child should not be subjected to the possibly upsetting or damaging experience of giving evidence or of feeling responsible for sending a close family member to prison.

2.7 Generally speaking there is considerable community pressure to prosecute for alleged child abuse offences and to deal harshly with convicted abusers. In Western Australia the courts' response to a finding of guilt is often to imprison the offender - thereby ensuring that

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<sup>1</sup> *Age of Majority Act 1972* s 5.

<sup>2</sup> *Evidence Act 1906* s 101(1).

<sup>3</sup> *Id* s 101A.

<sup>4</sup> *Child Welfare Act 1947* s 23A.

the abuse does not continue for the time being, but also limiting the scope for rehabilitation of the offender.<sup>5</sup>

2.8 In the past, the overriding consideration in calling any witness to give evidence has been the likely probative effect of the witness's testimony. Evidence has generally been excluded only because it was considered unreliable on the ground that it was not on oath or not subject to cross-examination.

#### 4. SWORN EVIDENCE AND THE COMPETENCY OF CHILD WITNESSES

2.9 In allowing children to give evidence, the common law regarded children without the benefit of modern knowledge of developmental psychology and with certain assumptions which may be outmoded in the second half of the twentieth century. Children were competent witnesses only if they could match the requirement for taking the oath, as adults had to do.<sup>6</sup> This meant they had to be adjudged able to understand the significance of taking an oath on the Bible and of the obligation to speak the truth while under oath. Since failure to speak the truth while under oath gave rise to the crime of perjury, presumably a child could not logically take the oath unless also old enough to be criminally liable.

2.10 What is meant by understanding the significance of the oath is nowhere thoroughly examined, but on a strict interpretation it does connote some understanding of religious ideas and of the "wrath of God" which may fall upon a person who swears an oath upon the Bible and then lies. This is not a test which a very young child, however intelligent and truthful, may be expected to pass. This is also not a test which, when strictly interpreted, can properly be applied to a child who has not had any religious training. As a result, the evidence of very young children was often not available under the common law. In some jurisdictions, including Western Australia, the harshness of the common law has been mitigated by a legislative provision which, widely interpreted, allows a young child who does not understand the nature of an oath to give evidence not on oath if the court thinks the child has the capacity to give rational evidence and is likely to tell the truth.<sup>7</sup> But the decision as to whether a child witness is competent to give evidence is made by the judge, entirely on the basis of the child's

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<sup>5</sup> "Where a child's word is the only evidence . . .", Interview with Dr Ralph C Underwager, Director of the Institute of Psychological Therapies in Minneapolis, Minnesota and an expert witness on child sexual abuse: *The Bulletin* 12.12.1989 p 144.

<sup>6</sup> *R v Brazier* (1779) 1 Leach 199, 168 ER 202.

<sup>7</sup> *Evidence Act 1906* s 101(1).

answers to questions put by him (or her) to the child in court<sup>8</sup> - not a very scientific or reliable method of determining a child's capacity, it may be argued.

## 5. UNSWORN EVIDENCE AND THE REQUIREMENT OF CORROBORATION

2.11 Another problem with children's evidence arises from the basic distrust with which the courts have regarded unsworn evidence in general and the evidence of children in particular.<sup>9</sup> Even if a child's unsworn evidence is admitted, that testimony has been treated as inferior in quality to sworn evidence in that no person could, until recently, be convicted upon the unsworn evidence of a single witness and, where children are concerned, it is still the case that no person can be convicted solely on the unsworn evidence of children under 12.<sup>10</sup> Such evidence has to be "corroborated" or supported by other, independent, evidence implicating the accused in the alleged crime. Because of the distrust of unsworn evidence, it is generally believed that the necessary corroboration can not be supplied by other unsworn evidence. The result is that, even in a case where there may be a large number of witnesses, if those witnesses are all children judged unable to take the oath (perhaps only because of lack of religious training and consequent inability to appreciate the significance of an oath sworn on the Bible), then no conviction will follow unless there is other independent sworn evidence implicating the alleged offender. In cases of crimes involving non-sexual physical abuse, a victim would usually sustain injuries that together with other circumstantial evidence may be sufficient to implicate the accused and secure a conviction. But where the charge is one of sexual abuse not involving sexual penetration, there will rarely be physical evidence to corroborate a child's complaint. In such cases police rarely bother to prosecute because of the certainty of an acquittal.<sup>11</sup>

2.12 The arguments against the evidence of young children focus on the alleged unreliability of such evidence.<sup>12</sup> It is suggested that children's evidence cannot be relied upon because:

<sup>8</sup> *R v Khan* (1981) 73 Cr App R 190; *R v Reynolds* [1950] 1 KB 606.

<sup>9</sup> The distrust of children's evidence is not peculiar to courts. For a discussion of this issue, see R K Oates *Children as Witnesses* (1990) 64 ALJ 129 which is a useful secondary source for those unfamiliar with the current state of received knowledge in this area.

<sup>10</sup> *Evidence Act 1906* s 101(2).

<sup>11</sup> Interview with Inspector Don McLeod, formerly police prosecutor attached to the Child Abuse Unit of the WA Police Force and at the time of writing prosecuting officer in all preliminary hearings involving charges of child sexual abuse.

<sup>12</sup> A D Yarmey & H P T Jones *Is the Psychology of Eye-witness Identification a Matter of Commonsense?* in S M Lloyd and B R Clifford (eds) *Evaluating Witness Evidence* (1983) 13-40.

- \* children do not have adequate cognitive skills to understand or describe accurately what happened;
- \* children have no ethical sense and readily tell lies;
- \* children have difficulty distinguishing fact from fantasy;
- \* children are inclined to tell authoritative adults what they believe the adults want to hear.

2.13 These generalizations about children's evidence tend to be based on anecdotal evidence rather than scientific study.<sup>13</sup> However, a study of developmental psychology of children assists in understanding how exactly the veracity of a young child's evidence may be tested.<sup>14</sup> For example, it is frequently stated that young children have difficulty in distinguishing between fact and fantasy, so that what they describe may be the product of their imagination rather than the truth. However, the prevailing view today is that the psychology of young children is such that (for instance) sexual abuse is not likely to be a theme of fantasy.<sup>15</sup> It is also common for those who object to children giving evidence to suggest that children's memories may not be as reliable as those of adults. However child psychologists and psychiatrists now generally agree that the accuracy of recall of children is probably at least as good as that of adults, except that older children and adults will remember for longer and in more detail.<sup>16</sup> As for the belief that children are apt to tell lies, it is worth noting that experts in child behaviour dealing with cases of alleged sexual abuse generally agree that false disclosures by children of sexual abuse are rare, though false retractions or denials are common.<sup>17</sup> The same cannot be said of formal complaints by adults about sexual abuse of children.

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<sup>13</sup> R K Oates *Children as Witnesses* (1990) 64 ALJ 129.

<sup>14</sup> A recent review of major research findings is D Thomson *Reliability and Credibility of children as witnesses*, paper presented at Australian Institute of Criminology Conference *Children as Witnesses* (1988). See also M De Young *A Conceptual Model for Judging the Truthfulness of a Young Child's Allegation of Sexual Abuse* (1986) 56(4) *Amer J Orthopsychiat* 550.

<sup>15</sup> *Ibid.* However, widely publicised cases of alleged child abuse in kindergartens and pre-schools (such as the 'Mr Bubbles' case in New South Wales) have highlighted the difficulties which arise where children's evidence (which may be genuine) becomes tainted by coaching or suggestions from adults, leading to complete failure of prosecutions.

<sup>16</sup> A Yates *Should Young Children Testify in Cases of Sexual Abuse?* (1987) 144:4 *Am J Psychiatry* 476.

<sup>17</sup> A H Green *True & False Allegations of Sexual Abuse in Child Custody Disputes* (1986) 25:4 *Jo of the Amer Academy of Child Psychiatry* 449.

2.14 The technical rules of evidence about corroboration and competency can cause serious difficulties for the administration of justice because they frequently preclude the possibility of convictions in crimes where children are the only witnesses. The question arises as to whether these rules ought to be changed in the interests of facilitating prosecutions, and, if so, what rules should be substituted.

## **6. TRIAL IN THE PRESENCE OF THE ACCUSED**

2.15 Another obstacle to successful prosecutions may be the unwillingness of a child to give evidence against an accused person. This is a particular problem where the accused is a member of the child's family or an intimate family friend, but it may also apply where the accused is a stranger. When a child faces the prospect of giving evidence against such a person in court, the child's first concern is frequently "Will *he* be there?" Fear of confronting the accused may paralyse the child in court or even cause him or her to refuse to give evidence. If that happens the accused may be acquitted even if the case against him is clear, because there is ordinarily no provision for a witness to give evidence except in court in the presence of the accused. This problem has led to various proposals for the taking of evidence from children in a way which eliminates the element of confrontation, including the use of screens, closed circuit television and pre-recorded evidence given on video-tape.

## **7. INTIMIDATING NATURE OF LEGAL PROCEEDINGS**

2.16 In addition, it is suggested that the formality and adversarial style of legal proceedings in the Anglo-Australian tradition may inhibit children in the giving of evidence. For any, even an adult, witness an appearance in court is likely to be stressful because of the unfamiliarity of the procedures, the strangeness of the courtroom, the sober dress of the judge and legal counsel, the unintelligible "legalese" in which lawyers address the court and witnesses, and the mysteries of the proceedings. This level of stress will obviously be increased substantially where the witness is subjected to rigorous cross-examination often involving suggestions that the witness is lying or at best mistaken. There is some suggestion that, where child witnesses are concerned, because these features of court proceedings may be especially intimidating and may affect the quality of children's evidence, courts should adopt different standards of dress, rearrange their furniture, and learn how to talk children's language. The question is to what extent such alterations in procedure are desirable and workable. It is extremely important that

any changes to procedures should not interfere with the fundamental rules about fairness to an accused person, who must be presumed innocent until the charge is proved against him or her.

2.17 Apart from the difficulty of successfully prosecuting for offences where the only or the crucial witnesses are young children, there is also the problem of the short-term emotional trauma or even long-term psychological damage which a child may suffer from the experience of giving evidence in certain kinds of legal proceedings. As one writer describes it, "the trial adds procedural assault to the initial sexual assault, with the child carrying considerable responsibility for its outcome".<sup>18</sup> The "procedural assault" may take several forms - most notably, repetitive questioning about the events and the requirement that the child tell, again and again, the details of an upsetting experience; and routine subjection by cross-examining counsel to repeated attacks on the child's motives, truthfulness, memory and ability to distinguish fact from fantasy. Sometimes it is suggested that children and offenders require therapy rather than the strong-arm intervention of the criminal law.<sup>19</sup> In one major German study it was apparently found that:

"for children who were actually abused, the most damaging part of their experience was not the abuse itself but rather the way the adults acted towards the child after the child had been abused."<sup>20</sup>

2.18 On the other hand, some children are said to be helped by participating in court proceedings which result in a conviction, finding in them

"a sense of confirmation that they were correct, trust in the fairness of the legal proceedings, relief from the fear that the accused will get out and punish them, and the working through that occurs with a public revelation."<sup>21</sup>

2.19 The question, then, is how the most distressing aspects of giving evidence can be minimised within the framework of a system which is designed to protect an accused person against the introduction of unfair elements into a criminal trial.

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<sup>18</sup> H Bauer *Preparation of the Sexually Abused Child for Court Testimony* (1983) 11 Bull Am Acad Psychiatry Law 287.

<sup>19</sup> A Banning *Lessening the involvement and trauma of children*, a talk at Australian Institute of Criminology Seminar on *Children as Witnesses* (May 1988).

<sup>20</sup> *When a child's word is the only evidence* . . . Interview with Dr Ralph C Underwager The Bulletin 12.12.1989 p 141.

<sup>21</sup> A Yates *Should Young Children Testify in Cases of Sexual Abuse?* (1987) 144:4 Am J Psychiatry 476 at 478.

## 8. REPETITIVE INTERROGATIONS

2.20 One of the features of the criminal justice system is that, before a decision is made to prosecute an offender, the prosecuting counsel must be satisfied that there is enough evidence to justify a prosecution. This would ordinarily entail at least one interview with police before a charge is laid and another with prosecuting counsel. If the alleged offence involves physical or sexual abuse, the evidence of doctors may be sought and the child subjected to further investigations by medical personnel. And where the child's psycho-social adjustment is affected, there may be even more interviews with social workers and psychologists. All this before the child witness even gets to court. If the decision is made to proceed with a charge, then, depending on the nature of the charge, the child may have to give evidence at a trial before a magistrate or at both a preliminary hearing before a magistrate and a trial before a judge and jury.

2.21 It is generally agreed that this repetitive interrogation of a child witness is never beneficial, and may very well be harmful. It can confuse the child as well as prolong the trauma of the events which gave rise to the complaint.

2.22 The question is what, if anything, can be done about reducing the number of interrogations to which the child is subject. There has been a great deal of discussion in other jurisdictions about the possible use of video-taped recordings to avoid duplication of interviews, and consideration has been given to allowing these recordings to be used in court. The main difficulty associated with their use is the rule against the use of hearsay evidence, which prevents an out-of-court statement from being introduced as evidence of the truth of the contents of the statement. The rationale for excluding hearsay evidence is that it is unreliable because it is not on oath, is not subject to cross-examination and is not the best evidence available. But with young children, because of their shorter recall and because of the possibility that the child may be unable in the courtroom to give a proper account of events, hearsay evidence *may* be the best evidence available. Should the rules of evidence be amended to allow the admission of video-taped interviews, and if so, how should pre-trial investigation procedures be amended to incorporate video-taping of child witnesses? What protections may need to be built into the system of video-taped interviews to ensure that the accused is not prejudiced and what further protections may be necessary to guard against the possibility that video-taped interviews will be used by defence counsel to form the basis of

cross-examination which may be as destructive and harmful to a child witness as giving evidence first-hand?

2.23 The other difficulty for the law with the use of video-taped interviews as evidence is the question of their reliability. There may be a temptation for inexperienced jurors and possibly even some judicial officers to regard the video-tape as more reliable than it is, not taking into account the limitations of lighting, camera-angles, possibly inferior technology, not to mention inadequate interviewing techniques. All of these factors may operate to affect the impressions created by a child witness on video-tape.

2.24 Moreover, the use of video-tapes as evidence raises some serious questions about children's rights to privacy and to control over the making and use of video-tapes. There may be a temptation in this "Age of Technology" for video-taped evidence to be used as the basis of later research, as other evidence is. But the potential for invasion of privacy with video-taped evidence, if it forms part of the record of the trial, is much greater. There can be no protection against visual identification of victims in such research.

## **9. LENGTH OF PROCEEDINGS AND DELAYS**

2.25 A feature of any legal proceedings is generally that they take a very long time - a long time in the preparation, long delays in getting hearing dates, with possible adjournments and postponements. For any person participating in legal proceedings this is frustrating, not to say harmful to the quality of his or her evidence. With very young children long delays may be especially problematic in that children's memories for events tend, according to the experts, to fade faster.

2.26 Sometimes the delay arises from the fact that no complaint was made at the time of the events complained of.<sup>22</sup> There are many reasons why this should be so. A sexually abused child may be silenced by threats from the abuser of violence to the child victim him- or herself or of harm to some other family member. Not infrequently an abuser warns a child not to tell anyone for fear the abuser will go to prison. If the abuser is a parent, the child may be torn by conflicting feelings of love and dependency on the one hand, and shame and guilt about

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<sup>22</sup> An extreme example is *Longman v R* (unreported) High Court of Australia, 6 December 1989, in which the events complained of had taken place (in relation to one complainant) 21 and 25 years prior to the trial, and the complainant was a mature woman of 32 when the matter came to trial. The complainant first complained to the police 25 years after the first alleged incident, 21 years after the second.

wrongdoing on the other. Later, with the growth of maturity and independence, an abused person may feel ready to talk about what happened and feel the need to seek justice. Sometimes, where the abusing adult establishes a continuing pattern of abusing children, an abused person may decide at a much later stage to act to stop the continuance of the abusing behaviour towards him- or herself or towards other children.

2.27 More commonly, the delay in bringing the matter to court arises from the usual remands and adjournments for preparation for trial or from the ordinary process of allocation of hearing dates. However, some delays considered routine by legal personnel may be very disturbing to a witness, especially one who is young and vulnerable, and ultimately such delays may not only affect the child's ability to give reliable testimony, but also prolong the trauma of the abuse and delay the healing process. Hayes and Pincus<sup>23</sup> cite the example of a 10 year old girl who, with her elder sister, gave evidence at committal proceedings in New South Wales against their stepfather. The children's mother and the elder sister gave their evidence first. Then the 10 year old girl was called to the witness box. She had only begun to give her evidence when the case was adjourned for 3 months with the child instructed not to mention or discuss the matter with her mother or older sister during the adjournment period. Three months later, when she entered the witness box, the first question she was asked was: "Have you discussed the matter with your mother or sister since you last appeared in court?"

2.28 In addition, young children do not easily cope with waiting for long periods in order to give evidence, yet no formal recognition is given to this obvious fact.

2.29 The question is whether anything can be done, in a practical way, to speed up the process and to eliminate unnecessary delays.

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<sup>23</sup> L Hayes and G Pincus *The Child's Experience of the Legal System*, an unpublished paper presented at Australian Institute of Criminology Conference *Children as Witnesses* (May 1988) 10.

## Chapter 3

### THE EXISTING LAW AND PRACTICE OF CHILDREN'S EVIDENCE IN WESTERN AUSTRALIA

#### 1. GENERAL CHARACTERISTICS OF THE WESTERN AUSTRALIAN LAW OF EVIDENCE

3.1 The Western Australian law of evidence is essentially English common law as interpreted in Australia and as amended by statute. The main relevant statute is the *Evidence Act 1906*. The Anglo-Australian law of evidence is characterised by:

- (a) the adversary system (with the right of cross-examination of witnesses to test the credibility of their evidence);
- (b) the giving of evidence on oath; and
- (c) the role of the jury.

The rules about the giving of evidence by children need to be seen in this context. In general evidence is acceptable only where it is subject to cross-examination, has been given on oath and is not likely to influence a lay jury improperly. Thus the common law rules of evidence excluding statements by a person not in court to be sworn or cross-examined apply as much to children as to adult witnesses, as do exceptions to the general rule such as the *res gestae* exception<sup>1</sup> and the exception applicable to certain documentary evidence.

#### 2. COMPETENCE OF CHILD WITNESSES

3.2 The general common law rule is that anyone is a competent witness, with certain exceptions. One of these exceptions governs children. In *R v Brazier*<sup>2</sup> it was held that no testimony whatever can be legally received except upon oath, and that the competence of children to give evidence depended upon their capacity to understand the necessity to speak

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<sup>1</sup> See para 3.16(b) for a brief explanation of the *res gestae* exception.

<sup>2</sup> (1779) 1 Leach 1999; 168 ER 202.

the truth while under oath. Thus there is, in effect, a common law presumption against the competency of a child to give evidence. A court may under the common law receive the evidence of a child only if the court is of the opinion that the child is able to take the oath, being cognisant of the nature and consequences of doing so. The early test was based on "the sense and reason [which the child] entertain[s] of the danger and impiety of falsehood".<sup>3</sup> The judge has a positive duty to inquire into the child's competence, regardless of the views of the parties,<sup>4</sup> and the inquiry must take place in open court in the presence of the jury and be recorded for the transcript.<sup>5</sup>

3.3 The common law requirement that a child's evidence must be on oath is amended by section 101(1) of the *Evidence Act 1906* which provides as follows:

"In any civil or criminal proceeding, or in any inquiry or examination in any Court, or before any person acting judicially, where any child who has not attained the age of 12 years is tendered as a witness and does not in the opinion of the Court, or person acting judicially, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if in the opinion of the Court, or person acting judicially, such child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth."

3.4 Thus the statute eliminates the need for the child to take the oath, but still requires the court to be satisfied that the child understands the duty of speaking the truth. The inquiry as to the child's ability to understand the duty to speak the truth must, like the inquiry under the common law, be conducted in open court, with both the accused and (where relevant) the jury present.<sup>6</sup>

3.5 In more recent years the English courts' understanding of the common law rule has been modified to some extent to recognise the fact that "in the present state of society, amongst the adult population the divine sanction of an oath is probably not generally recognised".<sup>7</sup> As a result it has been held that the proper inquiry for a judge required to decide whether a child should be sworn is:

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<sup>3</sup> Id 203.

<sup>4</sup> *R v Surgenor* [1940] 2 All ER 249.

<sup>5</sup> *R v Khan* (1981) 73 Cr App R 190; *R v Reynolds* [1950] 1 KB 606.

<sup>6</sup> *R v Lyons* (1889) 15 VLR 15.

<sup>7</sup> *R v Hayes* [1977] 1 WLR 234, 237.

"Whether the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct."<sup>8</sup>

It is not, in English law, necessary for a child to believe in God for him or her to be held able to understand the nature of an oath.<sup>9</sup>

3.6 But in Western Australia the common law test for competency to take the oath has been more strictly construed. In *Domonic v R*<sup>10</sup> the Court of Criminal Appeal held that the existence of s 101(1) of the *Evidence Act 1906* meant that something more was required than an understanding of the ordinary duty to speak the truth and the added responsibility to tell the truth imposed by the solemnity of the occasion. According to Franklyn J:

". . . the understanding of the need to tell the truth is a different understanding to that of the nature of an oath and is recognised as such in the very terms of s 101."<sup>11</sup>

Accordingly the Court held that an 11 year old boy ought not have been sworn who, while he understood the duty of speaking the truth and possibly also that, in giving evidence at the trial, he had an "added responsibility to tell the truth", had said that he did not understand what was meant by swearing on oath or promising God that he would tell the truth.

3.7 In practice it is said that section 101(1) operates to preclude convictions in many cases of child abuse where the victim is a child under 12, because the child witness whose evidence is critical to the prosecution is not sworn. Even if the child has had some religious education and believes in God, a court will sometimes refuse to swear the witness if he or she does not understand the literal meaning of the words "to swear an oath". Where the child has *not* had any religious education, or does not profess a belief in God and in divine punishment, then the child will not be sworn - regardless of his or her intelligence and capacity to give rational evidence. The statutory right of any witness to give evidence on affirmation does not appear to include children, if present practice is correct.

3.8 There is some difficulty with the present test for competency of a child witness because it apparently relies on the wrong criteria, namely religious understanding (for sworn

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<sup>8</sup> Ibid.

<sup>9</sup> *R v Khan* (1981) 73 Cr App R 190, 192.

<sup>10</sup> (Unreported) Court of Criminal Appeal, 20.2.1985, No 123 of 1984.

<sup>11</sup> Id 10.

evidence) and intelligence (for unsworn evidence), as tests for the capacity of the witness to assist the court in its fact-finding task. However, there is clearly a need for the judge or magistrate to have some guiding principle in determining competency of child witnesses.

### 3. CORROBORATION

3.9 The general rule of evidence is that the court may convict upon the uncorroborated (ie unconfirmed or unsupported) evidence of one witness, but there are exceptions. Again one of these relates to children. This exception is contained in section 101(2) of the *Evidence Act 1906* relating to the unsworn evidence of children and provides as follows:

"No person shall be convicted of any crime or misdemeanour on the testimony of a child who gives evidence under the provisions of this section unless the testimony of such child is corroborated by other evidence in some material particular."

3.10 There is also the difficulty that, even though the sworn evidence of a child need not be corroborated as a matter of law, a jury should probably be warned that there is a risk of acting on the uncorroborated evidence of a young child though they may do so if convinced that the witness is reliable.<sup>12</sup>

3.11 The justification for the requirement of corroboration in general is said to be:

"That the power of lying is unlimited, the causes of lying and delusion are numerous, and many of them are unknown and the means of detection are limited."<sup>13</sup>

In the case of the evidence of young children, the requirement of corroboration is based on the assumption that young children are unreliable witnesses, either because they have a greater tendency than adults to lie, or because they do not remember as well as do adults, or possibly because they do not understand what they see and hear.

3.12 Because certain crimes were thought to belong to the class where charges are easily made and not easily rebutted, formerly corroboration was frequently a requirement in respect of such offences. For example, in regard to the offences of sedition, perjury, the giving of false evidence before Parliament or a Royal Commission, the making of false claims,

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<sup>12</sup> D M Byrne QC and J D Heydon *Cross on Evidence* (3rd Aus Ed 1986) para 8.28.

<sup>13</sup> J Stephen *A General View of the Criminal Law of England* 249-50 cited in *Cross on Evidence* (3rd Aus Ed 1986) para 8.1.

declarations or statements, defilement of girls under 13 and under 16 and procurement, the Criminal Code laid down in each case a requirement of corroboration. In respect of certain of these offences, the requirement has (in response to a recommendation of the WA Child Sexual Abuse Task Force) been eliminated by section 31 of the *Criminal Law Amendment Act 1988*. Moreover, a judge is no longer required to warn a jury that it is unsafe to convict on the uncorroborated evidence of one witness (though there is a discretion to do so where the warning is "justified in the circumstances").<sup>14</sup> These changes reflect the modern view that it is inappropriate to treat the evidence of certain witnesses (especially female victims of sexual offences) as inherently unreliable. However, there is still a general requirement in section 101(2) of the *Evidence Act 1906* that a child's unsworn evidence be corroborated as a matter of law, and in all probability the requirement of a warning to the jury about the danger of convicting on the uncorroborated evidence of a child is still operative.<sup>15</sup>

3.13 Where corroboration is required it must take the form of a separate item of evidence implicating the person against whom the testimony is given. This means that evidence which merely confirms the credibility of a witness in a general sense does not corroborate that witness's evidence.<sup>16</sup> Thus adequate corroboration of a child's evidence is not provided by testimony which merely goes to the child's truthfulness and reliability; the corroborating evidence must in itself separately implicate the accused.

3.14 In the case of sexual abuse of young children the requirement of corroboration poses special problems, for there is rarely an independent witness or any external evidence of the events. The alleged crime is revealed only by the victim's complaint. If the victim is deemed too young to take the oath and there is no independent sworn witness or other material evidence, a conviction cannot follow and the accused must as a matter of law be acquitted. The Western Australian Child Sexual Abuse Task Force reported that during 1985-86, 28% of the 598 sexual offences reported to the Child Abuse Unit of the Police Department resulted in no charge because of the absence of corroborating evidence.<sup>17</sup>

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<sup>14</sup> *Evidence Act 1906* s 50 (substituted by s 42 of Act 70 of 1988).

<sup>15</sup> This is because the abolition of general rules about corroboration of the evidence of one witness in certain cases is probably not intended to include the special rule about children, in accordance with the maxim *generalia specialibus non derogant* (general things do not derogate from special things).

<sup>16</sup> D M Byrne QC and J D Heydon *Cross on Evidence* (3rd Aus Ed 1986) para 8.7.

<sup>17</sup> Child Sexual Abuse Task Force *A Report to the Government of Western Australia* (1987) para 6.7.

#### 4. HEARSAY RULES AND THE USE OF WRITTEN OR VIDEO-TAPED RECORDS OF INTERVIEW

3.15 In general, the common law excludes hearsay evidence - that is, any statement (oral or written) which is made out of court and reported to the court by a person giving evidence. However, the rule applies only where the out of court statement is tendered as evidence of the truth of its contents. It is not hearsay and is admissible where the purpose of tendering the statement is not to prove the truth of its contents, but only to prove that it was made.<sup>18</sup>

3.16 Of course, there are exceptions to the rule under both common law and statute.<sup>19</sup> Some of the main common law exceptions are:

- (a) "dying declarations" of persons who at the time of making the statement are convinced they are about to die;
- (b) spontaneous or emotional statements made contemporaneously with the events complained of as part of the *res gestae* or surrounding circumstances;
- (c) statements in certain public documents (such as certificate of birth, marriage or death);
- (d) voluntary confessions of accused persons in criminal proceedings;
- (e) certain adverse admissions in civil proceedings.

3.17 Legislation provides three exceptional situations in which a witness's out-of-court statement may be received in evidence:

- (1) A witness's written statement may be adduced at a preliminary hearing before a justice and, if the accused does not object, then the court may accept the written statement in lieu of the witness's oral evidence.<sup>20</sup>

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<sup>18</sup> D M Byrne QC and J D Heydon *Cross on Evidence* (3rd Aus Ed 1986) para 16.3.

<sup>19</sup> *Id* ch 17.

<sup>20</sup> *Justices Act 1902* s 69(2) and (3).

- (2) Where a witness's evidence has been presented orally and reduced to writing or transcribed at a preliminary hearing, if the witness afterwards dies, becomes so ill as not to be able to travel or is out of the State, then a written statement or transcript of the evidence signed by the justice before whom it was given may be read as evidence at the trial without further proof thereof.<sup>21</sup>
- (3) If a person who would be called as a witness in legal proceedings for an indictable offence is dangerously ill and unable to travel and unlikely to recover, so that it is not practicable for the witness to give evidence in the normal way, then the witness's evidence may be received on oath or affirmation by a justice, and provided that the person against whom the evidence is to be read has had a full opportunity of cross-examining the person who made the statement (or might have had if he or she had chosen to be present) that statement may be received in evidence at the trial to which the evidence relates.<sup>22</sup>

3.18 Where a preliminary hearing in a case of child abuse takes place it is apparently the case in Western Australia that a child's written statement of evidence is rarely accepted in lieu of oral testimony.<sup>23</sup> This is because the accused generally objects to reliance on the written statement. Moreover, if there is in existence a written statement the child may very well also be cross-examined about any inconsistencies between the written statement and his or her oral testimony.<sup>24</sup> The result is that in cases of child sexual abuse where the accused is committed for trial the complainant usually has to undergo twice the ordeal of giving oral evidence and of being cross-examined. The opportunity for the accused's counsel to cross-examine the child at a preliminary hearing may be used by the defence not only to test the evidence, but also to wear down the witness and so diminish the likelihood that the child will withstand the ordeal of a later trial. This sort of tactic can be very destructive and the procedure does not take account of the special vulnerability of child witnesses.

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<sup>21</sup> Id s 109.

<sup>22</sup> Id ss 110-112 and *Evidence Act 1906* s 108.

<sup>23</sup> According to information received from Inspector Don McLeod, formerly police prosecutor attached to the Child Abuse Unit of the WA Police Force. No statistics are available.

<sup>24</sup> The Commission has proposed the use of video-recorded statements in lieu of oral testimony at a preliminary hearing. Unfortunately these video-recorded statements may be subject to the same treatment as written statements insofar as cross-examination for inconsistency is concerned.

3.19 Where there is no preliminary hearing (either because the accused pleads guilty or elects to go straight to trial), there is no provision for the child's evidence to be given in the form of a written statement. It is only where the child witness fulfils the adult requirements that evidence in the form of a document may be received in place of oral testimony and then only on the conditions referred to in paragraph 3.17.

## **5. PRE-TRIAL AND COURT PROCEDURES**

3.20 The procedures adhered to in the courts of WA where children and other vulnerable witnesses are concerned are based on a mixture of law and practice.

### **(a) Interviews with witnesses**

3.21 In general in WA, when a complaint is made, or shortly thereafter, a written statement will be taken from a complainant which will form the basis of any charges laid. The statement is generally quite brief, but is reduced to writing by the police after an interview with the complainant and any independent witnesses. In the case of child victims of sexual or other physical abuse, where the complaint is made to the police, the child is interviewed by police officers who are members of the Child Abuse Unit of the WA Police Force. The first interviews are generally conducted at the headquarters of the Child Abuse Unit by young policewomen who have been chosen for the task because of their aptitude for and experience in working with children and who are able if necessary to conduct the interview very informally while engaging the child in play. The process of taking a statement may extend over several interviews until a coherent written account of alleged events can be compiled. If the allegations in the statement suggest that a charge should be laid, then a further interview or interviews will follow with the police officer in charge of prosecuting child abuse offences. The aim of his interview(s) is to determine whether the case is suitable for prosecution and whether the witness's story will stand up in court, and to prepare the witness for the preliminary hearing at which the child must give evidence-in-chief and be subject to cross-examination.

3.22 Thereafter, there is generally no further interview with a witness until the preliminary hearing is over and the indictment is being settled by the Crown Prosecutor. At that stage the Prosecutor may judge it appropriate to interview a witness to determine the strength of the

prosecution's case. If the only evidence of the offence is a child's testimony, the Prosecutor will want to discover what likelihood there is of a successful prosecution before deciding to proceed with the indictment. The interview with the Crown Prosecutor takes place at the central city offices of the Crown Law Department in St George's Terrace. The witness, if a child, may be brought in by a police officer or by a parent. It is not uncommon for a child witness to be interviewed alone.

3.23 If the decision is made to indict the accused, then a trial date is set and a particular member of the Crown Prosecutor's staff is allocated to conduct the trial. He or she will then, in the course of preparing the case, interview all witnesses. Generally speaking interviews take place in the Crown Law Department. It is quite common, but not standard procedure, for a prosecutor to arrange for a child witness to visit the courts, to see the courtroom, to try on a wig and gown, and generally to become familiar with the surroundings in which the trial will take place. However, it is very much up to the individual prosecutor to determine how he or she prepares any witness for the experience of giving evidence. Some prosecuting counsel believe that their professional detachment is compromised by any attempt to spend time with a witness other than in an interview, and those counsel accordingly avoid that sort of contact. Unfortunately in that case the child witness may have no prior orientation to the situation.

**(b) Length of proceedings and delays**

3.24 The system of first appearances and preliminary hearings followed by a trial means that in Western Australia a *minimum* of six to eight months' lapse of time can be expected between the first appearance of an alleged offender in a case of child sexual abuse and the trial. In many cases it is longer. Generally, it is suggested, the delays arise from the difficulty of getting court dates for hearings.<sup>25</sup> However, the Commission was not able to establish with certainty either the typical lapse of time between lodging of and complaint of child sexual abuse and the trial or the reasons for delays.

**(c) Trial in the presence of the accused**

3.25 Under section 635 of the Criminal Code, a trial must take place in the presence of the accused person. This requirement is based on notions of fundamental fairness to an accused

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<sup>25</sup> Interview with Inspector Don McLeod, formerly police prosecutor attached to the Child Abuse Unit of the WA Police Force.

person who, it is thought, must be permitted to "confront" his or her accuser. The rationale for this rule is the belief that a false accusation is much less likely in such circumstances.

3.26 Murphy J referred to this principle in *Whitehorn v The Queen*,<sup>26</sup> a case of alleged child sexual abuse in which the seven year old complainant was not called as a witness. Said his Honour, citing *Kirby v United States*:<sup>27</sup>

"The right of confrontation is one of the fundamental guarantees of life and liberty . . . long deemed to be essential for the due protection of life and liberty"

3.27 Exceptions arise:

- (i) Where the accused person so conducts himself as to render the continuance of the proceedings in his presence impracticable (in which case the court may order him to be removed, and may direct the trial to proceed in his absence);<sup>28</sup>
- (ii) Where the charge relates to a misdemeanour (in which case the court may, if it thinks fit, permit the accused to be absent during the whole or any part of the trial on such conditions as it thinks fit);<sup>29</sup>
- (iii) Where the charge relates to a simple offence and the accused does not appear to answer the charge;<sup>30</sup>
- (iv) Under sections 23A, 23B and 23C of the *Child Welfare Act 1947*, which provide an "alternative procedure" according to which legal proceedings may be conducted where a child is a witness.

3.28 As far as the last exception is concerned, the relevant sections of the *Child Welfare Act 1947* empower the Attorney General of WA to declare (by notice in the Government Gazette) that a court held at any place in the State specified is one at which an "alternative procedure" applies to proceedings in which a child is a witness. The "alternative procedure" requires that the respondent (who may be either a defendant in a trial involving an adult accused or any

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<sup>26</sup> (1983) 57 ALJR 809, 810.

<sup>27</sup> 174 US 47, 56 (1899).

<sup>28</sup> Criminal Code s 635.

<sup>29</sup> Criminal Code s 635, proviso.

<sup>30</sup> *Justices Act 1902* s 135(1).

party to an application for a declaration that a child is in need of care and protection) be held in a room set apart from the court and that the child's evidence be viewed by the respondent, and the respondent be viewed by the court, on a closed circuit television screen. The result is that the respondent is not seen or heard by the child witness.

3.29 The only court to which the "alternative procedure" has been applied so far is the Perth Children's Court as from July 1989. Until 30 November 1989, the procedure was used largely, if not exclusively, in trials involving adult offenders in cases of sexual offences against young children. Although the offences themselves were ordinarily indictable matters they were tried summarily by a magistrate in the Children's Court under section 20B of the *Child Welfare Act 1947*, which made most offences against child victims triable by summary procedure in the Children's Court. However, section 20B of the *Child Welfare Act 1947* has been repealed by the *Child Welfare Amendment Act (No 2) 1987* and, with the coming into force of the *Children's Court of Western Australia Act 1988 (No 2)* on 1 December 1989, all adult offenders are now tried in adult courts. In the case of indictable offences that means the District or Supreme Courts, with a possible preliminary hearing in a magistrate's court. There are as yet no special facilities in these courts for the use of closed-circuit television, so that child witnesses in child abuse cases involving adult offenders no longer have the benefit of the "alternative procedure".<sup>31</sup> The officer in charge of the Child Abuse Unit of the WA Police Force saw this as a major drawback. In his view the new alternative procedure in the Children's Court was proving extremely helpful in enabling child witnesses to give evidence in court without being intimidated by the accused's threatening presence.

#### (d) Open court

3.30 It is considered fundamental to the notion of a fair trial that the proceedings should be open to the public,<sup>32</sup> and the Justices Act<sup>33</sup> and Criminal Code<sup>34</sup> accordingly provide that in

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<sup>31</sup> According to a newspaper report dated 22.12.1989 the Crown Law Department acknowledges that this situation is an oversight and is considering proposals to remedy the problem: see *The West Australian* 22.12.1989 p 26.

<sup>32</sup> See Article 14 of the *International Covenant on Civil and Political Rights* contained in *Human Rights and Equal Opportunity Commission Act 1986* (Cth) Schedule 2; *Scott v Scott* [1913] AC 417, 420.

<sup>33</sup> *Justices Act 1902* s 65.

<sup>34</sup> Ss 608, 612.

the ordinary way an accused person is to be tried in open court, that is a public court with open doors.<sup>35</sup>

3.31 Under the common law, a departure from the "fixed principle which requires the administration of justice to take place in open court"<sup>36</sup> could be justified only where it was necessary for the administration of justice - such as in a situation of "tumult or disorder, or the just apprehension of it". In that case the court would be justified in excluding "all from whom such interruption is expected, and if such discrimination is impossible the exclusion of the public in general".<sup>37</sup>

3.32 In the case of summary offences this means trial before a magistrate or two justices. In the case of an indictable offence it means a trial before a judge and jury, with the possibility of a preliminary hearing before a magistrate.

3.33 One statutory exception to the general rule is that provided by s 635A of the Criminal Code, enacted in 1918. This exception arises where:

- (i) the accused is under the age of 18; or
- (ii) the charge is one of an offence of an indecent character committed against a person under the age of 18 years

(in which case the court may in its discretion exclude all or any persons not directly interested in the case from the courtroom or place of trial and may prohibit the publication of all or any portion of the evidence or proceedings).

3.34 Under the *Justices Act 1902* section 65 a justice may exclude all or any persons from court where "the interests of public morality" so require.

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<sup>35</sup> For a discussion of the history and meaning of open proceedings, see *Raybos Australia Pty Ltd v Jones* (1985) 2 NSWLR 47, 50-55.

<sup>36</sup> *Scott v Scott* [1913] AC 417, 435 (per Viscount Haldane), who held that "the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of public decency or morality that the hearing should take place in private".

<sup>37</sup> Id 445-6 (per Earl Loreburn).

3.35 In addition there is the exception provided by section 23 of the *Child Welfare Act 1947*. This affects a hearing or trial or application under the *Child Welfare Act 1947* and permits the exclusion of any persons not directly interested in the case from the courtroom or hearing where the interests of a child may be prejudicially affected. But this affects only trials in which the accused is a child or where a child is the subject of an application. It does not apply to ordinary criminal or civil proceedings where children may be witnesses.

3.36 Under the *Family Court Act 1975* section 82B there is also a requirement that Family Court of WA proceedings be heard in open court, although the court has power, either of its own motion or on the application of a party, to exclude specified persons or even to hear a matter in camera.

3.37 Under the new *Children's Court of Western Australia Act (No 2) 1988* which came into operation on 1st December 1989, there is a power in a member of the court to sit in chambers at any time and at any place and to exercise in chambers any jurisdiction of the court except a hearing with respect to a child accused of an offence or the determination of an application to declare a child in need of care and protection. In practice this means that only in a very limited range of minor matters will the chambers hearing be applicable (eg complaints of truancy under the Education Act, applications for guardianship under the Child Welfare Act, etc) Thus the *Children's Court of Western Australia Act (No 2) 1988* provides no new protections for child witnesses. In short, the position is that in WA the child witness in a criminal prosecution alleging sexual abuse will give evidence in open court unless the court deems otherwise.

#### **(e) Formality of proceedings**

3.38 Although the Family Court of Western Australia is enjoined to conduct its proceedings without undue formality<sup>38</sup> and neither presiding officers nor counsel are permitted to robe for proceedings,<sup>39</sup> and in the Children's Court presiding officers and counsel are also not permitted to robe,<sup>40</sup> there is no express provision for dispensing with formality in other courts. When the Family Court in Western Australia exercises its federal jurisdiction the judges *must*

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<sup>38</sup> *Family Court Act 1975* s 82B(3).

<sup>39</sup> *Id* s 82(B)(4).

<sup>40</sup> *Children's Court of Western Australia Act (No 2) 1988* s 37(3).

robe.<sup>41</sup> In the Courts of Petty Sessions, of course, magistrates sometimes wear black gowns but are not wigged; but in the District Court and Supreme Court judges and counsel all wear standard "uniform" of gown and wig in all proceedings except chamber applications.

3.39 There is little scope in the existing courts for alteration in the arrangement of furniture to create a less formal or threatening atmosphere. Not only is furniture fixed, but all the courtrooms in the Central Law Court building are more or less the same in layout and size with the presiding officer sitting on a raised dais and the witness giving evidence positioned in full view of and able to see the accused.

3.40 In the Supreme Court building the two courtrooms used for criminal cases are larger and more formal still, with all the main "players" in the drama seated at a level above the body of the court. The witness stand is unfortunately positioned almost directly opposite the dock, where the accused sits - an arrangement which possibly reflects the notion that the accused is entitled to be "confronted" by his accusers, but which is likely to be very intimidating.

3.41 The extent to which judicial discretion may be employed to facilitate the giving of evidence by children and other vulnerable witnesses is limited. However, the following are all considered to be within the ordinary discretion of a judge to ensure the proper conduct of a trial:

- "(1) to determine the most convenient place for the witness to sit, which may be anywhere in the court and not necessarily in the witness box;
- (2) to prevent children being questioned inappropriately by the use of the power to forbid oppressive and improper questions;
- (3) to grant adjournments for limited periods as seems necessary or desirable;
- (4) to exclude the public or any particular class of persons in order to assist a child giving evidence."<sup>42</sup>

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<sup>41</sup> Under the *Family Law Act 1975* (Cth) as originally enacted, s 97(4) required that neither judge nor counsel should robe. That sub-section was repealed on 5 April 1988.

<sup>42</sup> Letter from the Chief Justice dated 27.2.1990.

**(f) Provision of support persons**

3.42 There is no formal recognition in Western Australia of the need for a child (or other vulnerable witness) to have a support person present while giving evidence. However, the Commission believes that, in at least the East Perth Children's Court prior to 1 December 1989, the matter has on the whole been handled sympathetically and as within the discretion of the magistrate to allow. A practice therefore has existed of permitting a child witness in a child abuse case to have a sympathetic and familiar adult, such as a social worker or female police-officer whom the child has met before, seated close to the child while he or she is in the witness stand. The support person is, of course, not permitted to prompt or advise the child witness, but may offer a reassuring touch if the child seems to be having difficulty in continuing. Since this takes place in full view of the court and defence counsel, there has been no objection raised in the past. The judges of the Supreme Court apparently also regard themselves as having a discretion to allow child witnesses to have a "familiar supporting adult" sitting next to them while they are giving evidence, though there is no evidence as to how regularly this procedure is followed.<sup>43</sup>

3.43 One aspect of criminal proceedings in Western Australia which may not be as true of other jurisdictions but which seems relevant to the issue of support persons is that in many, even most proceedings, all legal personnel are male. A young child witness who has been abused by an adult male offender may find this especially intimidating, and the presence of an adult female as support person may be helpful in that respect alone - apart from the personal support such a person may offer.

3.44 Although not directly in point, recommendation 45 of the WA Child Sexual Abuse Task Force addressed the general question of the right of children to be informed about legal proceedings affecting them and concluded that:

"In all cases children should be kept informed about the process and progress of legal proceedings in terms they understand"

and that

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<sup>43</sup> Letter from the Chief Justice dated 27.2.1990.

"The views of the child in relation to the prosecution of an alleged offender should be obtained, and any decision contrary to that view should be conveyed to the child with an explanation for the decision."

A Working Party convened by the Child Abuse Unit of the Department for Community Services is currently investigating proposals for implementing this recommendation.

**(g) Training of lawyers and judges**

3.45 The present situation is that in WA there is no specialized training for lawyers in handling cases involving children - whether the children be witnesses or persons charged with an offence. It is left very much to the individual lawyer or judge to educate him or herself about child psychology, and what self-education occurs is therefore generally random and incomplete.

3.46 As a result child witnesses are not always treated with the respect they deserve, and their ordeal in court may prove quite fruitless when the accused is acquitted because the court is not satisfied by the child's evidence. A more sensitive approach would not only reduce the child's distress, but would almost certainly improve the quality of the evidence which he or she is able to give. It would seem that this is an issue which requires to be addressed.

3.47 CHILDRIGHT Inc (WA) has developed a training package and a manual for people who represent children which includes a section on child development principles which may be helpful here. During 1990, Childright Inc. in co-operation with the Law Society of WA, is running a series of five seminars for solicitors and Aboriginal Legal Service Field Officers who represent children.<sup>44</sup>

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<sup>44</sup> Childright Inc (P O Box 1028, Subiaco 6008) is an organisation of professional persons concerned with advocacy for and the rights of children.

## Chapter 4

### TECHNIQUES FOR IMPROVING THE POSITION OF THE CHILD WITNESS - THE SITUATION ELSEWHERE

#### 1. ASSESSING COMPETENCY WITHOUT REGARD TO AGE OR RELIGIOUS CONVICTION

4.1 In facilitating the giving of evidence by child witnesses, an obvious first step is to abolish technical rules which prevent children who are capable of assisting the court from giving sworn testimony because they are either too young, or lack the religious training necessary, to take the oath. This is the path that has been taken in some jurisdictions. In fact the overwhelming trend in the Anglo-Australian legal system is towards facilitating the giving of evidence by young children.

4.2 However, there remains the problem of distinguishing between children whose evidence may be reliable from those whose immaturity makes it impossible for them to assist the court. In the United States one remarkable case<sup>1</sup> has demonstrated the competency and reliability of a three year old child as a witness when the child was questioned appropriately, but ordinarily one would not expect such a young child to be a reliable witness. The question is whether it is necessary to test all young children for competency and, if so, what test should be applied.

4.3 In Australia a number of different approaches have been adopted. The most liberal approach might be said to be that in Queensland, where there is in effect a presumption of competency and, *whether or not the child understands the duty of speaking the truth*, the court "shall receive the evidence of the child though not given on oath unless satisfied that the child does not have sufficient intelligence to give reliable evidence".<sup>2</sup>

4.4 The distinction between sworn evidence and evidence not on oath is effectively abolished in Queensland by a provision to the effect that:

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<sup>1</sup> See D P H Jones and R D Krugman *Can a Three Year Old Child Bear Witness to Her Sexual Assault and Attempted Murder?* (1986) 10 Child Abuse and Neglect 253.

<sup>2</sup> *Evidence Act 1977* (Qld) s 9(1).

"The fact that the evidence of a child in any proceeding if not given on oath shall not of itself diminish the probative value of the evidence."<sup>3</sup>

4.5 Furthermore, in determining whether a child under the age of 12 years has sufficient intelligence to give reliable evidence, the court in Queensland may receive expert evidence as to the child's level of intelligence, including his or her powers of perception, memory and expression.<sup>4</sup> In New South Wales competency is still required, but if the child is not competent to take an oath, the child's evidence may nevertheless be received if the court is satisfied that the child "is of sufficient intelligence to justify the reception of evidence from the child . . . and the child understands the duty of speaking the truth". Such evidence is then treated as if on oath.<sup>5</sup> In South Australia it has been expressly provided that a child over the age of seven may give evidence on oath if he or she "understands the obligation of an oath".<sup>6</sup> But the distinction between evidence on oath and unsworn evidence remains - except in regard to children under the age of seven, whose unsworn evidence may be received as if on oath provided that

- "(a) the child appears to the judge to have reached a level of cognitive development that enables the child to -
  - (i) to understand and respond rationally to questions; and
  - (ii) to give an intelligible account of his or her experiences and
- (b) the child promises to tell the truth and appears to understand the obligations entailed by that promise."<sup>7</sup>

4.6 In Victoria the Law Reform Commission has recommended that "a child should be competent to give evidence if he or she understands that he or she is under an obligation to tell the truth, and can give a rational reply to questions about the facts in issue".<sup>8</sup>

4.7 In New Zealand witnesses under the age of 12 may be examined without oath if they make a declaration instead. The declaration amounts to a promise to tell the truth. Such a declaration has the same force and effect as evidence on oath.<sup>9</sup>

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<sup>3</sup> Id s 9 (3).

<sup>4</sup> Id s 9A.

<sup>5</sup> *Oaths Act 1900* (NSW) s 33.

<sup>6</sup> *Evidence Act 1929* (SA) s 12(1).

<sup>7</sup> Id s 12(2).

<sup>8</sup> Law Reform Commission of Victoria *Sexual Offences Against Children* (Report No 18 1985) rec 33(a).

<sup>9</sup> *Oaths and Declarations Act 1957* (NZ) s 13.

4.8 In England the *Children and Young Persons Act 1933* section 38(1) amends the common law in terms very similar to section 101 of the *Evidence Act 1906* with one difference - namely, that the section applies to children "of tender years" and not specifically to those under 12. However the Pigot Report released in December 1989 recommends that the competency rules be changed so that

- (i) all children should be presumed to be competent witnesses; and
- (ii) all witnesses under the age of 14 should give evidence unsworn while those who are older should be able to take the oath or affirm.<sup>10</sup>

The reason for abolishing the distinction between sworn and unsworn evidence is said to be to eliminate the possibility that jurors may draw an inference about the value of the evidence from whether it was on oath or not, as well as to discourage the possibility of young children taking the oath with no appreciation of the "divine sanction".<sup>11</sup>

4.9 In Scotland, on the other hand, there has never been a distinction between evidence on oath and unsworn evidence, and the essential question has been whether the child is competent on a test concerning the child's capacity to assist the court by giving intelligible evidence and telling the truth. However, the uncertainty of the Scottish test for competency led the Scottish Law Commission to propose in 1988 that a child should be presumed to be a competent witness unless there is a good reason to reach a different conclusion.<sup>12</sup>

4.10 Most jurisdictions continue to require the magistrate or judge, unassisted by any experts in child psychology, to determine whether a child witness is competent either to take the oath or to give unsworn evidence. However, as has been mentioned earlier, Queensland has recently amended the law to admit expert evidence concerning a child witness's level of intelligence, powers of perception, memory etc, where the child is under 12 years of age.<sup>13</sup> In New Zealand recent legislation has been passed which allows expert evidence to be given

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<sup>10</sup> Home Office *Report of the Advisory Group on Video Evidence* (Dec 1989) recs 17 and 18.

<sup>11</sup> Id para 5.14.

<sup>12</sup> Scottish Law Commission *The Evidence of Children and Other Potentially Vulnerable Witnesses* (DP No 75 1988) paras 2.2-2.3.

<sup>13</sup> *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld) s 62, which inserts a new s 9A into the *Evidence Act 1977*(Qld).

about the "intellectual attainment, mental capability and emotional maturity" of a child complainant under the age of 17.<sup>14</sup>

4.11 The terminology used in statutory provisions setting down competency tests varies, sometimes requiring the court to be satisfied that the child is "of sufficient intelligence to justify the reception of evidence from the child"<sup>15</sup> or words to similar effect.<sup>16</sup> The Australian Law Reform Commission has criticized this test, suggesting that "cognitive development" is a more appropriate basis than "intelligence" for assessing competency to give evidence.<sup>17</sup> However, there is the danger that if the level of "cognitive development" is to be established by expert evidence, the child may be subjected to challenges from opposing counsel concerning the reliability of the expert's opinion.

4.12 The Report of the WA Child Sexual Abuse Task Force (1987) recommended<sup>18</sup> that "the question of a child's competence to give evidence should be a matter for judicial determination" and that the tests for competency of children in section 101(1) of the *Evidence Act 1906* should be merged with section 100A into one general test along the lines of section 100A, which establishes an adult test based on the ability to understand (i) the duty to speak the truth and (ii) that a witness who does not tell the truth will be liable to punishment. The effect of such a recommendation would be to allow children to give unsworn evidence on the same terms as adults. Where the child appeared to the court not to understand the nature of, or the obligation imposed by, an oath (or its statutory alternative, a solemn affirmation), the child would nevertheless be able to give evidence provided that the child understood that he or she (i) was required to speak the truth and (ii) would be liable to punishment if he or she failed to do so. However, the weight and credibility to be afforded evidence of this kind would be influenced by the "manner and circumstances in which it is given and received and the fact that it was given without the sanction of an oath or solemn affirmation". This amendment would not affect the common law requirement that the judge warn a jury about the danger of convicting on the uncorroborated evidence of a child (whether that evidence is sworn or unsworn). That would remain unless separately abolished.

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<sup>14</sup> *Evidence Amendment Act 1989* (NZ) s 3, which inserts ss 23C-23I into the *Evidence Act 1908* (NZ). S 23G concerns expert witnesses who are registered psychiatrists or psychologists. Their evidence may extend to commenting on the consistency of the behaviour of the complainant with that of sexually abused children of the same age.

<sup>15</sup> *Oaths Act 1900* (NSW) s 33(2)(a)(i).

<sup>16</sup> *Evidence Act 1977* (Qld) s 9(1)(b).

<sup>17</sup> (Interim) *Evidence* Vol 1 (Report No 26 1985) 130.

<sup>18</sup> Rec 27.

## 2. ABOLISHING SPECIAL CORROBORATION RULES FOR CHILDREN

4.13 The movement here is towards abolition of special corroboration requirements in regard to children.

4.14 In England the *Criminal Justice Act 1988* abolished the requirement that the unsworn evidence of children be corroborated",<sup>19</sup> thus sweeping away the equivalent of section 101(2) of the *Evidence Act 1906*. Furthermore, unsworn evidence may now corroborate evidence (whether sworn or unsworn) given by any other person.<sup>20</sup> There is no mandatory requirement of a warning to the jury about convicting on the uncorroborated evidence of a child.<sup>21</sup>

4.15 In Scotland, where there is a *general* rule requiring corroboration of the evidence of a single witness in criminal cases, the Scottish Law Commission in 1988 saw no reason to make special provision for the evidence of children as a privileged class of witnesses.<sup>22</sup> One must bear in mind, however, that in Scotland there is no distinction between sworn and unsworn evidence and two or more unsworn children can corroborate the evidence of each other.<sup>23</sup>

4.16 In Australia the position varies from State to State, and there is no unanimity on the issue. New South Wales has abolished the common law requirement that the judge warn a jury that it is unsafe to convict on the uncorroborated evidence of a child, though the judge retains a discretion to do so.<sup>24</sup> No distinction is made between evidence on oath or on declaration. In Victoria the Law Reform Commissioner has recommended a similar approach.<sup>25</sup> In South Australia corroboration remains necessary as a matter of law where the child is over the age of seven and does not give sworn evidence; or where the child is under seven but does not have sufficient cognitive development for the court to accept the evidence as if on oath.<sup>26</sup> Queensland retains the common law rule of mandatory warnings to juries that

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<sup>19</sup> *Criminal Justice Act 1988* s 34(1).

<sup>20</sup> *Id* s 34(3).

<sup>21</sup> *Id* s 34(2).

<sup>22</sup> Scottish Law Commission *The Evidence of Children and Other Potentially Vulnerable Witnesses* (DP 75 1988) para 5.20.

<sup>23</sup> *Id* para 5.18.

<sup>24</sup> *Evidence Act 1898* (NSW) s 42A.

<sup>25</sup> Law Reform Commission of Victoria *Sexual Offences Against Children* (Report No 18 1985) rec 33(b).

<sup>26</sup> *Evidence Act 1929* (SA) s 12(3).

it is unsafe to convict on the uncorroborated evidence of the complainant in a sexual offence,<sup>27</sup> but the rule is general and does not apply specifically in relation to children.<sup>28</sup>

### 3. AMENDING THE HEARSAY RULES

4.17 Many proposals for improving the position of child witnesses involve infringements of the rule against hearsay evidence to admit so-called "secondary evidence". To improve the situation along the lines proposed would therefore involve changes to the hearsay rules by the creation of further statutory exceptions. Such exceptions might cover especially the use of video-taped interviews or written depositions in lieu of evidence by the child; and the provision of reports or giving of evidence by the social workers, police officers or specialist children's interviewers who had interviewed a child and who reported to the court on what the child said and how he or she behaved in interview, etc. The latter evidence might be admitted either in place of, or in addition to, the child's own evidence as evidence of the truth of the complaint.

4.18 In considering whether amendments should be made to the general rule of exclusion for hearsay evidence, the Australian Law Reform Commission in 1987 justified the continuance of an exclusionary rule on the grounds, inter alia, that:

- . out of the court statements are not usually on oath;
- . there is usually an absence of testing by cross-examination;
- . the evidence may not be the best evidence;
- . there are dangers of inaccuracy in repetition;
- . there is a risk of falsification.<sup>29</sup>

Nevertheless the ALRC proposed that in both civil and criminal proceedings, the exclusionary rule should not apply where first-hand hearsay<sup>30</sup> was the best evidence that a party had available. Although the ALRC did not specifically address the problem of children's evidence, the suggestion was made that hearsay evidence would be the best evidence available

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<sup>27</sup> *Evidence Act 1977* (Qld) s 9(2), amended by *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989*.

<sup>28</sup> D M Byrne QC and J D Heydon *Cross on Evidence* (3rd Aus Ed 1986) para 8.26.

<sup>29</sup> Australian Law Reform Commission *Evidence* (Rep No 38 1987) 72.

<sup>30</sup> Evidence given by a person who heard or saw the representation made by another person who witnessed the event in question.

if the maker of the statement reported as hearsay was unavailable to give evidence him or herself. The question of when a child might be regarded as "unavailable" was not specifically addressed, but it was suggested that in civil proceedings a witness might be regarded as unavailable if, inter alia, he or she was "legally incompetent or not permitted by law to give the evidence" or "had resisted all reasonable steps to compel the giving of evidence" In criminal proceedings a more stringent test for availability was suggested in the interests of protecting the accused. However, the test suggested would apparently have allowed the record of evidence of a child witness to a preliminary hearing to be admitted at the trial later by way of exception to the hearsay rule.<sup>31</sup>

**(a) Written depositions or statements made out of court**

4.19 Several Australian jurisdictions have made moves in the direction of admitting these.

4.20 In New South Wales, if a court is satisfied by the evidence of a medical practitioner that the attendance of the child would be injurious or dangerous to the child's health, the court may receive in evidence a written statement of the child, and the written statement has the same effect as if the child were so ill as not to be able to travel, or as if there was no reasonable probability that the child would ever be able to travel or give evidence. The written statement is taken pursuant to the ordinary provisions for taking depositions under section 406 of the *Crimes Act 1900* and the case is proceeded with and determined in the absence of the child.<sup>32</sup> Even where the child's health is not threatened, a court has power to allow previous depositions made in previous connected proceedings to be read as evidence and the child need not be examined on these.<sup>33</sup>

4.21 In South Australia a 1988 amendment to the *Evidence Act 1929*<sup>34</sup> allows the court in its discretion, in cases where the alleged victim of a sexual offence is a young child (i.e. one under the age of 12), to admit hearsay evidence in the form of "evidence of the nature and contents of a complaint from a witness to whom the alleged victim complained of the offence" provided that the child is called, or available to be called as a witness. In exercising its discretion the court must consider "the nature of the complaint, the circumstances in which it

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<sup>31</sup> Australian Law Reform Commission *Evidence* (Rep No 38 1987) para 128.

<sup>32</sup> *Children (Care and Protection) Act 1987* (NSW) s 122.

<sup>33</sup> *Crimes Act 1900* (NSW) s 409A.

<sup>34</sup> *Evidence Act 1929* (SA) s 34ca.

was made and any other relevant factors" and admit the evidence only if of the opinion that the evidence has sufficient probative value to justify its admission.

4.22 In Queensland an out-of-court statement by a child under 12 contained in a document is admissible in evidence provided the child is available to give evidence in the proceedings.<sup>35</sup>

4.23 In England the *Criminal Justice Act 1988* makes an out-of-court statement made by a child under 14 admissible at committal proceedings in place of the child's oral testimony, unless the defence objects or the prosecution requires the child to attend and identify the accused or the court is satisfied that it has not been possible to obtain an appropriate statement.<sup>36</sup>

4.24 In what are often called "child cases" in English law - that is, in custody, access and wardship applications - courts have come to rely heavily on a variety of secondary evidence sources: court welfare officers' reports, evidence of social workers' files, details of interviews with children from social workers, foster mothers, child psychiatrists, clinical psychologists and specialist child interviewers in sexual abuse. Apparently by long-established practice such evidence is rarely challenged as to its admissibility although regularly challenged as to its weight. The justification for admitting such evidence is said to be its importance.

"In many cases it may be the only means of establishing the abuse alleged, since medical evidence may frequently be neutral or the diagnosis disputed. Even more important, it may be the only available evidence of the identity of the alleged abuser, a vital fact if the child is to be protected and the risks to the child evaluated by the judge."<sup>37</sup>

4.25 In Scotland child sexual abuse cases fall within the system of "children's hearings" created by the *Social Work (Scotland) Act 1968* to replace the juvenile courts. *The Civil Evidence (Scotland) Act 1988* renders all children's hearings cases (with the exception of offences by children, which are still governed by the criminal code of evidence) civil cases and subject to the evidentiary rules governing civil proceedings. A new rule in *the Civil Evidence (Scotland) Act 1988* abolishes the bar against hearsay evidence in civil cases, thereby apparently allowing the admission in child sexual abuse cases of social workers'

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<sup>35</sup> *Evidence Act 1977* (Qld) s 93A.

<sup>36</sup> *Criminal Justice Act 1988* (UK) s 103(1) and (3).

<sup>37</sup> *H v H (Minor) (Child Abuse: Evidence)*; *K v K (Minors) (Child Abuse: Evidence)* [1989] 3 WLR 933, 952E.

reports, out of court statements, video interviews, and all other forms of hearsay - regardless of the question whether the child is available to confirm or be cross-examined on the evidence.

4.26 In Israel, where the system of criminal procedure and evidence is still largely based on English common law and there is a general rule of exclusion of hearsay evidence, the Law of Evidence Revision (Protection of Children) Law 5715-1955 allows the admission of certain hearsay evidence in a prosecution for an "offence against morality" committed against a child under 14. Such evidence takes the form of a record-of-interview or report prepared by a specially appointed "youth interrogator".<sup>38</sup> However, a conviction cannot be based on the hearsay evidence alone: it must be supported by other evidence.<sup>39</sup>

**(b) Video-taped interviews or statements**

4.27 One of the more obvious off-shoots of developments in video-technology is its application to situations where previously a written record or transcript was admissible as evidence.

4.28 Thus in South Australia the *Justices Act 1921* has been amended to allow a video-taped record of an interview with a child to be used in place of a written statement at a preliminary hearing provided there is also a written transcript of the interview available<sup>40</sup> and in Queensland, where an out-of-court statement by a child is admissible in evidence, that statement may take the form of a video-tape.<sup>41</sup>

4.29 More controversial is the use of video-taped interviews with a child in lieu of oral testimony where a written statement would not be accepted. Such video-tapes are increasingly being used for a variety of reasons by workers in the field of child abuse. The advantages of such techniques are said to be that they:

- . reduce the number of interviews required;

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<sup>38</sup> Law of Evidence Revision (Protection of Children) Law 5715-1955 s 9.

<sup>39</sup> Id s 11.

<sup>40</sup> *Justices Act 1921* (SA) s 106(2)(c)(ii).

<sup>41</sup> *Evidence Act 1977*(Qld) s 93A(1) read with the definition of "document" in s 5.

- . can be shown to the alleged perpetrator when he or she is questioned by police and may induce a confession;
- . accurately record the child's story, demeanour, etc;
- . may be able, if used in evidence, to eliminate the need for the child to give evidence in court;
- . can help in counteracting failure of recall where there is a long delay between the events themselves and the trial.

4.30 However, there are some clear difficulties with video-taping apart from the rules against hearsay evidence. One difficulty arises from the fact that the child rarely tells the full story in a single first interview, so that a complete statement may be difficult to obtain except by way of a "staged" interview after all the relevant facts had been disclosed. Moreover, video-taped interviews are only effective as evidence where the interviewer has the appropriate skills and training.

4.31 Nevertheless, in 1986 and 1987, when the new English Criminal Justice Act was still at the Bill stage, Professor Glanville Williams argued strongly for the use of video-taped interviews instead of, or in conjunction with, the proposed closed-circuit television system of taking evidence from children.<sup>42</sup> Professor Williams considered that video-recorded interviews held at an early stage and properly conducted by trained "child examiners" would have advantages for the defence as well as the child witness. In particular, the video-tape would show if the child's evidence had been improperly elicited by leading questions, and would allow the defendant to know all the details of the child's evidence before the trial. The difficulty of cross-examination might be dealt with in one of two ways, Professor Williams suggested: *either* the defendant's right to cross-examine would remain untouched, and the child could be called at the trial by either side and answer questions by closed circuit television; *or* the defendant and his legal adviser would be invited to observe the video-taped interview by one-way mirror and to put questions to the child through the mouth of child

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<sup>42</sup> G Williams *Video-taping Children's Evidence* [1987] New Law Journal 108.

examiner, with whom the defendant's lawyer would be in inconspicuous telephone communication.<sup>43</sup>

4.32 There are some special difficulties with Professor William's proposals, not the least of which is the practical question of getting a video-taped interview which is both early (and so fresh, untainted by the ideas of other people) and complete (incorporating cross-examination). Nevertheless the Advisory Group on Video Evidence in England chaired by His Honour Judge Pigot, after a detailed study of the difficulties, recommended that

"At trials on indictment for violent and sexual offences of cruelty and neglect and at comparable trials in the juvenile courts, video-recorded interviews with children under the age of 14 conducted by police officers, social workers, or those whose duties include the investigation of crime or the protection of the welfare of children should be admissible as evidence (and where the offence charged is of a sexual nature the provision should extend to child witnesses under the age of 17).<sup>44</sup>

4.33 However, at least some of the advantages for a child witness of a video-taped interview in lieu of oral testimony would also be served by the use of a video-recording of the evidence-in-chief and cross-examination of a child witness at the preliminary hearing. The practical difficulties attached to obtaining an acceptable "interview" would be eliminated in such a procedure.

4.34 Although no Australian jurisdiction has yet expressly adopted this route, it is an option which appears to deserve serious consideration because of its obvious advantages, which include

- (i) elimination of the need for the child to give the same evidence twice; and
- (ii) a likely salutary effect upon the performance of defence counsel at the preliminary hearing, where it is said to be common for counsel to seek to intimidate or "wear down" the child witness (the salutary effect arising from the defence counsel's awareness that any harassment of the child witness will be viewed by the superior court judge and jury on the video-tape).

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<sup>43</sup> Id 109-110.

<sup>44</sup> Home Office *Report of the Advisory Group on Video Evidence* (Dec 1989) rec 1. For a detailed discussion of how such a proposal would work, see paras 2.19-2.29 of the Report.

4.35 Provided the child is available at the trial for further questioning by either the prosecution or the defence counsel,<sup>45</sup> there would seem to be no serious objection to such a practice. Such further questioning would be likely to be extremely limited and therefore far less traumatic to the child witness than a complete re-telling of events and a repetition of the ordeal of cross-examination, and could if necessary take place with the use of the closed-circuit television procedures discussed below. Such a practice would be simpler than, but not inconsistent with, the recommendations of the Pigot Report, which criticises the system of "old style" committal proceedings in England that closely resembles our own, and in which it remains possible for the defence to insist upon the calling of witnesses to give evidence in person.<sup>46</sup> The Advisory Group commented:

"[I]t seems to us that in cases which involve children existing committal proceedings are irredeemably flawed. They enable defendants to subject child witnesses to all of the burdens which we have already discussed: delay, appearance in open court, cross-examination in open court, face-to-face confrontation with an alleged perpetrator and repeated unnecessary worry about matters which may be extremely distressing or even traumatic."<sup>47</sup>

The Report goes on to recommend, in addition to the admissibility of video-recorded disclosure interviews with police, social-workers, and so on, special provisions which would eliminate the need for any child witness to give evidence in court twice.<sup>48</sup> This would be achieved as follows. If a video-recorded disclosure interview of the type mentioned exists, then the admissibility of that evidence at the trial would be ruled on in advance by the trial judge by way of special pre-trial application, at the hearing of which the child witness would not appear. Immediately following the hearing of this application, a special preliminary hearing in an informal setting would take place, at which the child would appear and be shown the disclosure video-tape and invited to adopt it. At that stage the child would be examined and cross-examined. This preliminary hearing would itself be video-recorded. Both video-tapes would be shown at the trial in lieu of evidence in chief and cross-examination. If no disclosure video exists, then the special preliminary hearing would still be conducted to allow

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<sup>45</sup> As is the case under the Texas Code of Criminal Procedure art 38.071 which allows a video-recorded interview to be admitted into evidence under specified conditions, including the availability of the child to testify.

<sup>46</sup> Home Office *Report of the Advisory Group on Video-Evidence* (Dec 1989) paras 6.3-6.4.

<sup>47</sup> *Id* para 6.6.

<sup>48</sup> *Id* recs 1-4.

for examination and cross-examination of the child and a video-recording of the proceedings would be made and given in evidence at the trial.<sup>49</sup>

4.36 A system which resembles that recommended by the Pigot Report has already been introduced in New Zealand, under legislation passed late in 1989. The New Zealand legislation provides broadly for the following in cases defined as "of a sexual nature" involving complaints under 17 years of age:

- (i) In matters triable on indictment, the preliminary hearing will be presided over by a Judge of the District Court.<sup>50</sup>
- (ii) At such preliminary hearing the evidence of the complainant may be given in the form of a video-tape made under prescribed conditions.<sup>51</sup>
- (iii) The defendant is not entitled to a copy of the video-tape, but may view it before the hearing within the Court precincts in the presence of an officer of the Court.<sup>52</sup>
- (iv) At the preliminary hearing only specified persons may be present in the courtroom while the video-tape is being shown.<sup>53</sup>
- (v) Where the accused is committed for trial, the prosecutor applies before the trial to a Judge of the Court by which the indictment is to be tried for directions as to the mode by which the complainant's evidence will be given at the trial.<sup>54</sup>
- (vi) The Judge may direct that the complainant give evidence at the trial:
  - \* by video-tape shown at the preliminary hearing (with such excisions as the Judge may order to take account of the rules of admissibility evidence);

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<sup>49</sup> Id paras 2.25-2.31 and 2.35.

<sup>50</sup> *Summary Proceedings Amendment Act (No 2) 1989* (NZ) s 4, which inserts s 185B into the *Summary Proceedings Act 1957*. (NZ)

<sup>51</sup> Id s 5.

<sup>52</sup> Id s 3(3).

<sup>53</sup> Id s 5(2).

<sup>54</sup> *Evidence Amendment 1989* (NZ) s 3 (which inserts s 23D into the *Evidence Act 1908* (NZ)).

- \* by closed circuit television from outside the courtroom;
- \* in the courtroom, but screened from the accused by a wall, partition, screen or one-way glass (with audio-links where appropriate);
- \* at a special closed hearing outside the Court precincts where the complainant's evidence is recorded on video-tape (with such excisions as the judge may order to take account of admissibility rules) and afterwards shown to the jury.

(vii) The Judge may give such directions as the Judge thinks fit as to the mode of any cross-examination or re-examination of the complainant.<sup>55</sup>

4.37 In Queensland, the 1989 amendments to the *Evidence Act 1977* make provision, among the list of alternative procedures which may be adopted by the court in the case of "special witnesses", for admission of a video-tape of the evidence of the special witness made "under such conditions as are specified." The video-taped evidence may in such a case be viewed and heard in the proceeding instead of the direct testimony of the special witness.<sup>56</sup> Possibly this provision could cover the video-taping of the witness's evidence given at a preliminary hearing, but it remains to be seen whether the Queensland authorities will choose to develop that practice.

4.38 It is clear that the traditional manner of taking evidence is undergoing a searching re-examination in the light of modern technological developments and that video-recording is being seen as a way of using that technology to treat child witnesses more humanely.

#### **4. CLOSED-CIRCUIT TELEVISION**

##### **(a) How it works**

4.39 A related approach to the giving of evidence by children which has rapidly become popular is the use of closed-circuit television - generally referred to as "video-link", although

<sup>55</sup> Id (inserting s 23E into the *Evidence Act 1908* (NZ)).

<sup>56</sup> *Evidence Act 1977* (Qld) s 21A(2)(e), inserted by *The Criminal Code, Evidence Act and Other Acts Amendments Act 1989* (Qld). These amendments came into operation on 3 July 1989.

this terminology may be misleading, since it suggests that the evidence is pre-recorded, whereas it is given "live".

4.40 The "video-link" arrangement is designed primarily to eliminate the element of confrontation between the child witness and the accused but, depending on the particular set-up, may also reduce for the witness the stress associated with giving evidence in the intimidating atmosphere of a courtroom.

4.41 "Video-link" is a system in which the courtroom is connected by closed circuit television to a nearby witness-room. In the typical situation there are television cameras and screen in both the courtroom and the witness-room, so that persons in the courtroom are able to see and hear the person(s) in the witness-room and vice-versa. In most cases it is the child-witness who is excluded from court and the accused who remains. However in the Western Australian experiment in the East Perth Children's Court prior to December 1989, it was the accused who sat in the witness-room and observed proceedings in court while the child-witness gave evidence in the normal way.<sup>57</sup> Other variations on the theme allow the child-witness to hear, but not see, events in the courtroom (the so-called "one-way" system) or allow the child-witness to see everyone in the courtroom *except* the accused.

#### **(b) Use in other jurisdictions**

4.42 There is as yet no empirical evidence to show that the use of video-link technology has enhanced the giving of evidence by children, either by reducing the trauma for the child or by improving the quality of the child's evidence.<sup>58</sup> Nevertheless all other states in Australia are investigating, or have implemented, procedures involving closed-circuit television.

4.43 Under New South Wales legislation (as yet unproclaimed) it will be mandatory, in criminal proceedings involving an assault or abuse of a child under ten at the time of giving evidence, that the child's evidence be given by means of closed-circuit television, unless the court certifies that the appropriate facilities are not available.<sup>59</sup> The judge is required to direct the jury that the procedure is mandatory and that no inference should be drawn from its use. It

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<sup>57</sup> See Department of Community Services *Closed Circuit Television in the Perth Children's Court* (1990).

<sup>58</sup> Australian Law Reform Commission *Children's Evidence by Video Link* (DP 40 1989) para. 21.

<sup>59</sup> *Crimes Act 1900* (NSW) s 405 D as amended by *Crimes (Personal and Family Violence) Amendment Act 1987* (NSW) sch 3.

is also a requirement that where video-link is used the accused should be able to view the child witness and any person who is with the child as support person or interpreter.

4.44 In Victoria the Law Reform Commission has recommended<sup>60</sup> that in cases of sexual offences all complainants under 16 should be *permitted* to give evidence by closed-circuit television, the decision in this regard being a matter for the prosecution. Here too the child witness is the person to be excluded from the courtroom. However the procedure suggested is not mandatory and therefore the judge's warning would apply only where the procedure was used. The judge's duty there is to inform the jury that the procedure is to assist the child and no inference is to be drawn concerning the guilt of the accused.<sup>61</sup>

4.45 In Queensland legislation has recently been passed allowing a range of alternative procedures in cases involving all "special witnesses" (including children under 12, persons who as a result of intellectual impairment or cultural differences would be likely to be disadvantaged as a witness, and any person likely to suffer severe emotional trauma).<sup>62</sup> Among these options is that of enabling the special witness to give evidence in a room other than the courtroom and the accused to view the giving of evidence by the special witness by means of electronic device or otherwise.<sup>63</sup> The Queensland court may, either of its own motion or on application by a party to proceedings, order that one of the alternative procedures be used.

4.46 In the Australian Capital Territory the Evidence (Closed Circuit Television) Ordinance 1989 set up a pilot study of the presentation of children's evidence through closed circuit television and a research programme to monitor and evaluate the use of the video-link procedure for the giving of evidence by children. The one-year research project is now under way and due for completion later this year.<sup>64</sup>

4.47 In South Australia there is discussion on the use of video-link, but as yet no legislative programme or clear proposals. In Tasmania a 1987 Discussion Paper on child witnesses recommended that where a child is required to give evidence in proceedings, whether a

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<sup>60</sup> Law Reform Commission of Victoria *Sexual Offences Against Children* (Report No 18 1985) rec 36.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Evidence Act 1977* (Qld) s 21A as amended by *The Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld).

<sup>63</sup> *Id* s 21A(2)(c) read with s 21A(4).

<sup>64</sup> The expectation is that the project will be completed by 30 September 1990.

committal or a trial, legislation should allow the child to give that evidence via a live television link with the courtroom.<sup>65</sup>

4.48 In New Zealand legislation now provides that in "cases of a sexual nature" evidence may be given via closed circuit television where the complainant is under 17 years of age.<sup>66</sup>

4.49 In England the *Criminal Justice Act 1988* provides for children under 14 to give evidence by closed circuit television in trials on indictment for offences involving an assault, injury or threat or injury to a person, cruelty to a person under the age of 16, sexual offences and attempts to commit such offences. The video-link has been in operation in 14 Crown Courts in England and Wales since the beginning of 1989.

4.50 In the United States of America, 24 states had by June 1987 passed legislation allowing child victims in sexual abuse cases to testify by closed-circuit television.<sup>67</sup>

4.51 So far as the Commission is aware only one jurisdiction, namely Scotland, has examined the use of closed circuit television and concluded that its disadvantages outweigh its demonstrated usefulness.<sup>68</sup>

**(c) Child or accused out of the courtroom?**

4.52 The benefits of using closed-circuit television will vary according to the particular system used - according to whether it be one-way or two-way, whether it is the defendant or the child who remains in the courtroom, and so on. The most critical decision in implementing the use of closed-circuit television is whether it is the child or the defendant who should be out of the courtroom.

4.53 In all jurisdictions other than Western Australia where closed-circuit television is in use it is the child who is out of the courtroom. There seems to have been no consideration elsewhere of the Western Australian alternative, in which the child gives evidence in the

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<sup>65</sup> K Warner *Child Witnesses in Sexual Assault* Discussion Paper No 1, Law Reform Commission of Tasmania, Oct 1987.

<sup>66</sup> *Evidence Act 1908(NZ)* s 23E(b) read with s 23C(b)

<sup>67</sup> Australian Law Reform Commission *Children's Evidence by Video Link* (DP 40 1989) Appendix C.

<sup>68</sup> Scottish Law Commission *The Evidence of Children and Other Potentially Vulnerable Witnesses* (DP No 75 1988) paras 4.18-4.28.

courtroom in the normal way, but the defendant observes the child witness from another room by means of the closed-circuit television link.

4.54 The reasons for the assumption that it is the child who must be removed are not spelled out, but it would appear that this system reflects a belief that it is desirable to eliminate not only the confrontation with the accused, but also the experience of being in a courtroom.<sup>69</sup> The courtroom, it is said, is "an unfamiliar, formal and intimidating environment"<sup>70</sup> which not only traumatizes the child, but also affects the quality of the child's evidence if he or she is able to give evidence at all.<sup>71</sup>

4.55 The theory behind the using of a closed-circuit television system where the child witness gives evidence from another room is thus that this system will:

- (i) protect the child from an anxiety-inducing courtroom, full of strangers and rituals, and from the attendant distress;
- (ii) protect the child from a physical confrontation with the accused (though the child and the accused may be able to see each other on the television screens);
- (iii) render the child better able to tell his or her story, remember, and answer questions clearly and accurately, so allowing the better ascertainment of facts.<sup>72</sup>

4.56 However, as has been stated earlier, there is as yet no reliable empirical evidence to show that the purposes of closed-circuit television are best served by the system so widely introduced, and there are several potential disadvantages in comparison with the system where the child remains in the courtroom and the accused observes proceedings from another room by closed-circuit television. Macfarlane<sup>73</sup> draws attention to three. These are:

- "(1) increasing a child's feelings of isolation by separating him or her from those with whom the child is communicating and from the room where everything else is going on;

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<sup>69</sup> See, for instance, Australian Law Reform Commission *Children's Evidence by Video Link* (DP 40 1989) para 11-12 and 16-17.

<sup>70</sup> Australian Law Reform Commission *Children's Evidence by Video Link* (DP 40 1989) para 11.

<sup>71</sup> Scottish Law Commission *The Evidence of Children and Other Potentially Vulnerable Witnesses* (DP No 75 1988) para 3.7; Australian Law Reform Commission *Children's Evidence by Video Link* (DP 40 1989) para 10.

<sup>72</sup> Australian Law Reform Commission *Children's Evidence by Video Link* (DP 40 1989) paras 16 and 17.

<sup>73</sup> Macfarlane *Diagnostic Evaluations and the Use of Video Tapes in Child Sexual Abuse Case* (1985) 40 *Miami Law Review* 135, cited in Scottish Law Commission *The Evidence of Children and Other Potentially Vulnerable Witnesses* (DP No 75 1988) para 4.22.

- (2) the potential distraction or intimidation of the child by the presence of the camera and other necessary electronic equipment; and
- (3) the child's potential difficulty in concentrating on a face and a voice speaking to him or her from a television monitor over a prolonged period of time."

There are other potential problems, some practical and some philosophical, which also merit consideration in weighing up the two forms of closed-circuit television link-up:

- (i) Where the child witness gives evidence from a room outside the courtroom, the fact-finder has no opportunity for direct contact with the witness and must rely for assessment of credibility on a television image (with all the known possibilities for distortion or enhancement inherent in the use of cameras).
- (ii) In that situation counsel cannot examine the child directly, and any rapport between them may be difficult to establish.
- (iii) Where the child is in a room outside the courtroom, any support person (if permitted) would need *either* to be fully observable at all times on the television screens in the courtroom or otherwise *or* would need to be proven impartial almost to the point of being a stranger in order to eliminate the danger of his or her prompting or influencing the child's evidence without the court's being aware.
- (iv) Where the child gives evidence from a room outside the courtroom, he or she never enters the courtroom throughout the whole case. This may spare the child a difficult experience, but may on the other hand deprive him or her of the right to be heard directly by the court and of the therapeutic effect which it is said the experience of testifying in court, and being believed, sometimes has. This is especially true with older children.
- (v) Where young children give evidence over closed-circuit television, it is far more likely that the child witness will not be fully aware of what is happening in the courtroom or of the seriousness of the proceedings - children being used to television as an entertainment medium and having perhaps learned to distance themselves emotionally from its frequently violent and upsetting

content. If this is so, it has implications both for reliability of the evidence and for the child's right to be respected.

4.57 Under the alternative system, introduced experimentally in Western Australia from 23 June 1989 to 1 December 1989, the legal proceedings are conducted as usual, with the exception that, during the giving of evidence by the child witness, the defendant is in another room and views proceedings by closed-circuit television. The reason for adoption of this system in Western Australia was "to permit children to give evidence in as normal a setting as possible and to avoid the interposition of an artificial medium between them and the court".<sup>74</sup>

4.58 Although the system was in operation for the short interval of five months, and only five cases (involving seven child witnesses aged from seven to 15 years old) were heard by the closed-circuit television method, an evaluation of the system based on those five cases suggests that it may have fewer disadvantages than the situation in which the child witness is the person removed from the courtroom.<sup>75</sup>

#### **(d) Unrepresented accused**

4.59 Both systems present difficulties where an accused is unrepresented, since communication between the accused and the child witness must be there, whether directly or by means of closed-circuit television.

4.60 In the Australian Capital Territory, the suggestion has been made that this be dealt with by a "one-way" link in which the child witness hears, but does not see, the accused. However in England, where this matter was considered by a joint committee of the BMA and the Magistrates' Association as long ago as 1949, a recommendation was made that the grant of legal aid should be compulsory in cases of child abuse.<sup>76</sup>

"The Committee thought it most undesirable that defendants in such cases should themselves cross-examine child witnesses, for such children often showed terror when spoken to by the alleged offender."<sup>77</sup>

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<sup>74</sup> Department for Community Services *Closed Circuit Television in The Perth Children's Court* (1990) Overview.

<sup>75</sup> Ibid.

<sup>76</sup> See G Williams *Video-taping Children's Evidence* [1987] *New Law Journal* 108, 110.

<sup>77</sup> Ibid.

The Pigot Report goes further and emphatically states that "defendants should be specifically prohibited by statute from examining child witnesses in person or through a sound or video-link".<sup>78</sup>

4.61 If it is recognized as important for the child not to have to confront the accused, then some method must be found of allowing an unrepresented accused to cross-examine a child complainant without the necessity for the confrontation. Apart from the option of compulsory legal aid, it seems that the use of an intermediary of another kind may be the only solution. In such a situation the intermediary would put to the child questions formulated by the accused.

4.62 The Pigot Report discussed the use of an "interlocutor" such as a paediatrician, child psychiatrist, social worker or person who enjoys the child's confidence in cases where a trial judge thought it appropriate in the examination of a very young or very disturbed child.<sup>79</sup> It concluded that there was no great difference in principle between the use of someone other than the accused to communicate with a child and the employment of an interpreter where a witness cannot speak English.<sup>80</sup>

4.63 Viewed in this light, the use of an intermediary seems a less radical departure from established procedure.

4.64 In the recent reforms of New Zealand law, there is in fact an express provision prohibiting an unrepresented accused from putting questions directly to a child complainant. Instead the accused puts questions to the complainant by stating them to some other person approved by the Judge, and that person repeats the questions to the complainant.<sup>81</sup>

**(e) The Perth Children's Court pilot program**

4.65 The overall conclusion in the pilot study examining the closed-circuit television system in the Perth Children's Court was favourable and that:

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<sup>78</sup> Home Office *Report of the Advisory Group on Video Evidence* (Dec 1989) para 2.30.

<sup>79</sup> Id para 2.32.

<sup>80</sup> Id para 2.33.

<sup>81</sup> *Evidence Amendment Act 1989* (NZ) s 3, inserting s 23F(3) into the *Evidence Act 1908* (NZ).

"it is an approach with considerable potential benefits not only for child abuse cases but also for cases involving adult witnesses who might be intimidated by the presence of the respondent [sic]."<sup>82</sup>

4.66 Shortcomings of the system related chiefly to the defendant's inability to communicate effectively with counsel by microphones and headsets. Some child witnesses found it distracting when defence counsel spoke to the defendant via the microphone and headset and would have preferred appropriate adjournments for counsel to consult with the defendant. In fact most of the defence counsel involved themselves preferred to seek adjournments rather than try to receive instructions from the client via headphones during cross-examination. Magistrates surveyed also had some reservations about the use of microphones and headsets, which they saw as hindering the defendant's access to counsel. However, it is worth bearing in mind that in the superior courts an accused does not generally sit so close to counsel that the accused can pull on counsel's elbow or whisper in his/her ear, and counsel ordinarily require adjournments to consult with or take instructions from the client.

4.67 The virtue of the Western Australian experiment was said to be its unobtrusiveness - the equipment in the courtroom was scarcely noticed by the child witnesses and did not interfere with their ability to give evidence. It required no adjustment from the witness' normal mode of speech and communication.

4.68 Unfortunately the defendant's responses were not sought, so that no information is available about their perceptions.

4.69 However, since the Western Australian experiment took place in the Children's Court before a magistrate, the question remains whether in the more intimidating setting of a jury trial in the District or Supreme Court the Western Australian alternative would be preferable.

**(f) Discretion versus no discretion**

4.70 Where closed-circuit television is employed for the benefit of child witnesses, the question arises as to whether the system should be used in all cases or only where deemed necessary. Some of the child witnesses surveyed in the WA study said they would have preferred to have the defendant in court when they gave evidence, and this suggests that the

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<sup>82</sup> Department for Community Services *Closed Circuit Television in the Perth Children's Court Report* (1990) Overview.

closed-circuit television system ought to operate only where required. The main argument against the exercise of a discretion to allow closed-circuit television as an alternative procedure is said to be the possible prejudice which may result when a jury draws an adverse inference from the use of the equipment. Thus in New South Wales and Western Australia the use of closed-circuit television was made compulsory. On the other hand, the Australian Law Reform Commission felt that a discretion was necessary in the Australian Capital Territory's pilot programme in fairness to the child witness who may prefer a "day in court" or who may be insulted when a special "protective" measure was offered,<sup>83</sup> and the (ACT) Evidence (Closed Circuit Television) Ordinance 1989 reflects that.<sup>84</sup> The discretion is in the court to make an order allowing the use of closed circuit system if the court is satisfied *either* that the child would suffer harm if required to give evidence in the normal way *or* that it is likely that the facts would be better ascertained that way.<sup>85</sup> In Queensland too there is a similar discretion,<sup>86</sup> while in Victoria the Law Reform Commission has recommended that child witnesses in cases of sexual offences should be permitted to give evidence by closed circuit television if the prosecution so desires.<sup>87</sup> The question of prejudice to the accused in such a case must, one supposes, be dealt with by an appropriate judicial warning.

4.71 Clearly, if the use of closed-circuit television (or indeed any alternative procedure) is to be discretionary, or the subject of an application, the matter ought to be handled as a preliminary one and dealt with prior to the main hearing - either by formal application to the court, or by pre-trial conference - so that the parties, and especially the child witness for whose benefit the procedures are designed, may be adequately prepared for the proceedings.

## 5. EXCLUDING THE PUBLIC

4.72 The WA Child Sexual Abuse Task Force concluded that judicial discretion to close a court did not sufficiently protect child witnesses from the trauma associated with public hearings and recommended that there should be mandatory closure of the court in all criminal proceedings involving sexual offences against a child.<sup>88</sup> The recommendation expressly

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<sup>83</sup> Australian Law Reform Commission *Children's Evidence by Video Link* (DP 40 1989) para 46.

<sup>84</sup> S 5.

<sup>85</sup> S 6.

<sup>86</sup> *Evidence Act 1977* (Qld) s 21A(2).

<sup>87</sup> Law Reform Commission of Victoria *Sexual Offences Against Children* (Report No 18 1985) rec 36(e).

<sup>88</sup> Child Sexual Abuse Task Force A Report to the Government of Western Australia (1987) rec 30.

exempted "a person who might provide support to the child".<sup>89</sup> A difficulty with such a recommendation is that it would preclude observation of court proceedings for research purposes such as the present project on which the Commission is engaged. It would also remove, as a matter of routine and without recourse to a superior court's supervision by way of appeal or review, the protections provided by the public nature of hearings which are guaranteed in the International Covenant on Civil and Political Rights,<sup>90</sup> and which are generally regarded as inherent in the Anglo-Australian legal system. This is probably not a result intended by the Task Force.

4.73 However, in South Australia a 1988 amendment to the *Evidence Act* provides that, where the alleged victim of a sexual offence is a child (defined as a person under the age of 18) and is to give evidence in proceedings related to the offence, while the child is giving evidence the court *must* be cleared of all persons except:

- "(a) those whose presence is required for the purposes of the proceedings;
- (b) a person who is present at the request or with the consent of the child to provide emotional support of the child;
- (c) any other person who, in the opinion of the courts should be allowed to be present."<sup>91</sup>

4.74 This approach is the reverse of the common law, and raises the question whether a member of the public with an interest in remaining in court (such as an independent researcher) will have a right to be heard on the issue.

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<sup>89</sup> Id para 6.33.

<sup>90</sup> Article 14(1) reads as follows:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The Press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

This article is implemented in Australia by incorporation in Schedule 2 of the *Human Rights and Equal Opportunity Commission Act 1986*. (Cth)

<sup>91</sup> *Evidence Act 1929* (SA) s 69(1a).

4.75 Given the fundamental protection of civil rights which is at risk in the closing of courts, it would seem that a cautious approach is justified, and that the judicial discretion to exclude the public remains the most appropriate solution.

## **6. PREPARATION AND SUPPORT FOR CHILD WITNESSES**

### **(a) Preparation**

4.76 One obvious way of minimizing the frightening aspects of giving evidence for *any* witness is by preparation aimed at demystifying the legal process.

4.77 Most people fear and distrust the unknown, and most witnesses are nervous about appearing in court. It goes without saying that most witnesses will feel at least a *little* more comfortable if they know exactly what will happen to them at the court appearance and what they will be required to do. This includes knowing who else will be present, what they will be wearing and why, what will be said and what that means, and what the physical surroundings will be like.

4.78 One British study of nine children in a particular case who were aged between six and eleven showed that the children's expressed concerns about going to court were:

- \* fear of seeing their parent(s);
- \* general anxiety about going to court;
- \* fear of being "got at" by the defendant(s);
- \* worry that they themselves might be punished;
- \* concern about not understanding the questions;
- \* fear of not being able to remember what happened.<sup>92</sup>

4.79 Preparation of an appropriate kind may be given by the prosecuting counsel, by a specially trained officer of the court, or by some other qualified person. Probably it would involve a tour of the court a day or two before the trial, with an opportunity to "try-out" the witness stand and use the microphone, to try on a wig and gown if these are to be used, and to explore the layout of the courtroom, but it could go further. A far more thorough and

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<sup>92</sup> See *A Role in Six Days* Community Care 19 May 1988 28.

apparently successful programme of preparation used by Wilkins, Ferguson and Bradford<sup>93</sup> involved the group of nine child witnesses referred to above and their parents or foster parents in a series of sessions over a period of five days, where the children and, sometimes the adults, engaged in discussions, drawings, role-playing and a visit to the court.

4.80 Not all child witnesses will want this pre-trial experience, finding every reminder of the forthcoming trial unpleasant. But it is worth considering whether such preparation, once completed, will not enhance the ability of a child witness at the trial to concentrate on the job of telling her or his story and not to be distracted or daunted by the unfamiliarity of the situation. Certainly the children in the study by Wilkins et al appeared to have benefited by preparation, reporting that they did not feel intimidated by the court setting or the questions, and that it was the content of their story and seeing their parents that was the most painful part of their experience.<sup>94</sup>

4.81 Another simple device for reducing the anxiety of a child witness may be the opportunity to read a specially prepared children's booklet about appearing in court. Such a booklet has been produced in South Australia<sup>95</sup> and offers a stage-by-stage description, appropriately illustrated, of what takes place when a child is required to give evidence in court of the crime of sexual abuse.

## **(b) Support**

4.82 One technique for improving the situation of child witnesses is to provide the child with a trained support person during the time investigation and prosecution of a complaint of child sexual abuse is proceeding. The need for some support is now widely recognised, but there is little consensus on the most appropriate role for such a person, and in most common law jurisdictions such support would appear to be still sadly lacking.

4.83 "Support" can, of course, cover a wide range of activities. At its minimum it would usually involve accompanying a child to court and sitting near him or her either in court (or in a monitor room) when he or she is giving evidence. In the United States, where some very

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<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> Children's Interests Bureau and the SA Attorney-General's Department *Tell it like it is; your guide to being a witness in Court* (1989).

young children have given evidence, the support person has been the child's mother who has held the child on her lap while the child was questioned. The role of the support person is to give the child some emotional security in a strange situation, thereby enhancing the child's ability to withstand the ordeal of giving evidence. This is valuable for both child and prosecution. It is not the part of a support person to coach or prompt the child in what he or she has to say, but the role should not preclude a gentle encouragement to "tell the judge what happened" when a child seems to freeze, or giving a soothing pat to a distraught witness. Experience will obviously determine acceptable limits to such support and provide guidelines for support persons.

4.84 In Australia the need for formal provision for support persons in court proceedings is beginning to be recognised. In South Australia a child witness (i.e. a person under the age of 18) is entitled to have a support person present in the court, and within reasonable proximity, while he or she gives evidence in court.<sup>96</sup> The choice of support person is the child's, except that a witness or prospective witness in the proceedings can not be chosen. In Queensland there is no right to a support person, but the court is empowered to order that a person approved by the court be present while the child (or other "special witness") is giving evidence in order to provide emotional support to the special witness.<sup>97</sup>

4.85 In England availability of support for child witnesses has been described as "haphazard", with no clear responsibility on the part of any one to provide the child witness and family with information about court processes, to liaise with others about the child's individual needs, to prepare the child for the experience of giving evidence, to accompany and support the child at court, and to explain the verdict.

4.86 In Scotland there has been some suggestion that the role of "safe-guarders" appointed under the *Children's Act 1975* should be extended to criminal proceedings where the child is a victim. At present the "safe-guarder" - usually but not necessarily a person with legal, social work or educational qualifications - has the duty of "safeguarding the interests of the child" in children's hearings and related Sheriff's Court proceedings concerning offences by children, truancy matters and what in Western Australia are called "care" proceedings.<sup>98</sup>

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<sup>96</sup> *Evidence Act 1929* (SA) s 12(4) and (5).

<sup>97</sup> *Evidence Act 1977* (Qld) s 21A (2)(d).

<sup>98</sup> See M Rayner *Report of a Project to Study the Legal Representation of Children in the UK* (Winston Churchill Memorial Trust of Australia 1988) 19-21.

(c) **The Israeli System**

4.87 Israel has combined the role of support person with other functions and a unique system of "youth interrogators" has been in operation since 1955.<sup>99</sup> Under this scheme, control of prosecutions for child abuse against persons under the age of 14 rests effectively with persons called "youth interrogators" appointed by the Minister of Justice after consultation with a specially selected Committee of members with legal, psychological, educational and social welfare training. The "youth interrogator" takes complete charge of interviewing the child victim, and no-one else (except the child's parents, guardian or custodians, or a medical doctor) is permitted to examine the child concerning the alleged offence. Police questioning is conducted through the youth interrogator, and the child cannot be called as a witness without the permission of the youth interrogator. Hearsay evidence in the form of a record of interview or report prepared by a youth interrogator is admissible as evidence in court, although this evidence cannot on its own support a conviction and must be corroborated if a conviction is to follow. According to one report:<sup>100</sup>

"in the majority of cases neither the police nor the court has any personal contact with the child, nor have they any way of getting a first-hand impression of the child."

If the youth interrogator permits the child's appearance in court to give evidence, then it is part of the youth interrogator's role to prepare the child for the court appearance and to accompany her or him to court. Thereafter, although the youth interrogator can ask the court to discontinue the taking of evidence from the child if he or she thinks the line of questioning is likely to prove harmful to the child, the discretion to allow questions belongs to the judge.

4.88 This unusual method of handling child abuse cases operates within a legal system which, in the sphere of criminal law, is still by and large English common law with English rules of criminal procedure and evidence, employing the adversary system<sup>101</sup> - a fact which must answer those critics who object that the Israeli solution is not necessarily incompatible with an English common law legal system.

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<sup>99</sup> Established under the Law of Evidence Revision (Protection of Children) Law, 5715-1955.

<sup>100</sup> H David, Paper delivered at *Children's Evidence in Legal Proceedings - An International Conference* held at Selwyn College, Cambridge, England, June 1989.

<sup>101</sup> E Harnon *Children's Evidence within the Israeli Legal System* Paper delivered at *Children's Evidence in Legal Proceedings - An International Conference* held at Selwyn College, Cambridge, England, June 1989.

4.89 The biggest problem in the Israeli system has been the selection and training of youth interrogators. Most youth interrogators are social workers who after selection undergo some training in police and court procedures, and by and large this has been considered the appropriate professional background for the job of handling cases of child sexual abuse. After conducting the necessary "interrogation" for criminal prosecution purposes the "youth interrogator" is able to switch over easily into the "crisis intervention" or therapeutic role with an otherwise normal individual, which is the trained social worker's special sphere.<sup>102</sup>

## **7. EDUCATING LEGAL PERSONNEL**

4.90 There is widespread agreement that most judges and lawyers need some specialised knowledge and skills in order to deal satisfactorily with child witnesses.

4.91 One American writer goes so far as to suggest that the most expeditious changes would occur through the education of judicial officers, because through the use of their discretion they can influence the whole conduct of a trial and thereby control the treatment of children and other vulnerable witnesses.<sup>103</sup>

4.92 There seems little doubt that a knowledge of developmental psychology would assist judicial officers who are required to assess the competency of child witnesses and to give directions to jurors on the evidence of children without the assistance of experts in child psychology.

4.93 For instance, some familiarity with the results of research into children's memory, suggestibility and ability to differentiate fact and fantasy may dispel the myths surrounding children's evidence and give judicial officers greater confidence in controlling the line of questioning adopted by some counsel. In addition, judges who recognize that young children have a limited attention span and may not be able to concentrate for long periods may be readier to grant frequent but brief recesses to accommodate such witnesses.

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<sup>102</sup> H David, Paper delivered at *Children's Evidence in Legal Proceedings - An International Conference* held at Selwyn College, Cambridge, England, June 1989.

<sup>103</sup> A Yates *Should Young Children Testify in Cases of Sexual Abuse* (1987) 144:4 *Amer J Psychiatry* 476.

4.94 However, it is not merely judicial officers who are seen to benefit from such knowledge and skills. All personnel dealing with child witnesses (including police investigators and prosecutors) need to have not only good rapport with children, but also interviewing skills that are appropriate to children and which take account of children's language skills, susceptibility to leading questions, capacity for recall and retrieval of memory and ability to distinguish fact from fantasy.<sup>104</sup>

4.95 In some jurisdictions the judge's task of assessing competency of child witnesses is facilitated by rules permitting expert evidence to be given about the child's cognitive development.<sup>105</sup> In this way express recognition is given to the importance of a knowledge of child psychology and, in particular, knowledge of an individual child's level of development in assessing general competency to give evidence. But usually the expert's role ends there. It is, however, at least theoretically possible for the expert to be retained to advise on a child's competency to answer a particular question which arises in the course of a trial. Simpler, of course, would be expertise on the part of the judicial officer to determine such questions unassisted by specialists in the field of child psychology.

## 8. OTHER TECHNIQUES

### (a) Screens

4.96 A number of jurisdictions make provision for the use of various screening devices to remove the element of confrontation in a child sexual abuse case between a child witness and the accused.

4.97 In Australia generally suggestions for the use of screens have been over-taken by the introduction of closed-circuit television, but in England screens have been used for some years at the Crown Court and at some Magistrate's Courts in committal proceedings. However, their use has apparently been seen largely as an interim measure prior to full implementation of the closed-circuit television system in all courts. The use of a screen in England is dependent on a successful application by the prosecution to the trial judge, and the defence may object. There had by June 1989 been no official ruling on when screens were to be used, but judges

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<sup>104</sup> *Children's Legal Centre Information Sheet: The Child Witness* (1990) 63 Childright 9.

<sup>105</sup> *Evidence Act 1977* (Qld) s 9A; *Evidence Act 1906* (NZ) s 23G.

appeared to take into account two considerations: first, the child's age; second, whether the defendant was known to the child.<sup>106</sup>

4.98 In Queensland the new provisions under the *Evidence Act 1977* for "special witnesses" include a discretion in the court to order that "the person charged . . . be obscured from the view of the special witness while the special witness is giving evidence . . .".<sup>107</sup> The use of screens in such a case is clearly one alternative to the use of closed circuit television. In New Zealand the *Evidence Amendment Act 1989* similarly provides for the trial judge to order the use of screens or partitions between a child witness and the accused.<sup>108</sup>

#### (b) Joint interviews

4.99 Another technique used for reducing the number of interviews a child victim may be subjected to is that of "joint interviews". In this situation interviewers from different disciplines (for example, a police officer and a social worker) collaborate to conduct a single interview with a child witness. This technique is in use in Canada.<sup>109</sup> It was also apparently successful in the well-known Bexley experiment in England.<sup>110</sup>

4.100 It should be borne in mind that this technique, while in theory attractive, may not work well in practice without specialist training, because of the different aims and perspectives of interviewers from different agencies. It may be difficult, for instance, for a police interviewer, engaged in evidence collection and accustomed to rules preventing the use of "leading" questions, to work with (say) an interviewer with an urgent child-protection purpose, where such questions may be considered helpful in eliciting information upon which to assess the risk of further abuse. Nevertheless the WA Child Sexual Abuse Task Force recommended their use during investigative procedures.<sup>111</sup>

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<sup>106</sup> J Morgan and J Plotnikoff *Children as Victims of Crime: Procedures of Court* Paper delivered at *Children's Evidence in Legal Proceedings - An International Conference* held at Selwyn College, Cambridge, England, June 1989.

<sup>107</sup> *Evidence Act 1977* (Qld) s 21A(2)(a).

<sup>108</sup> S 3, which inserts s 23E(c) and (d) into *Evidence Act 1908* (NZ).

<sup>109</sup> Commonwealth Secretariat *Guidelines for Police Training on Violence Against Women and Child Sexual Abuse* (1988) 51.

<sup>110</sup> See *Child Sexual Abuse; Joint Investigative Project, Final Report* issued by Metropolitan Police and Bexley London Borough (1987).

<sup>111</sup> Child Sexual Abuse Task Force *A Report to the Government of Western Australia* (1987) rec 19.

(c) **Pre-trial diversion**

4.101 Because the participation of a sexually abused child as a witness in legal proceedings against a family may be ultimately more damaging to the child than the abuse itself, and because the aftermath of a successful prosecution is frequently imprisonment of the offender with the child both deprived of further contact with a possibly loved family member and having to carry responsibility for the accused's fate, it is arguable that intra-familial child abuse ought to be dealt with by means other than by criminal prosecution.

4.102 Seen from the child's perspective, a pre-trial diversion programme may "prevent the subjection of children who are victims of child sexual assault to additional trauma through associated criminal proceedings".<sup>112</sup> Seen from a community point of view, diversionary programmes may avoid the commission of similar offences through rehabilitation of the offender. This last may be true of either pre-trial or post-trial diversionary programmes, but as post-trial diversionary programmes are available only after a trial and conviction they do not offer the same benefits to child witnesses as do pre-trial diversion.

4.103 The WA Child Sexual Abuse Task Force recommended that a system of pre-trial diversion in cases of intra-familial child sexual assault should be adopted in Western Australia, and that the scheme, being directed at offender rehabilitation, should be operated by the same body as now delivers probation and parole services.<sup>113</sup> That recommendation was made in December 1987. Apparently a Working Party has been established to make proposals for implementation of a pre-trial diversion programme, but so far no such scheme has been implemented.

4.104 In New South Wales a pilot scheme for pre-trial diversion of offenders in cases of child sexual abuse was introduced in 1989 under the *Pre-Trial Diversion of Offenders Act 1985*<sup>114</sup> and is now operative at Cedar Cottage in Westmead, NSW, with approximately five cases on the books at the time of writing.

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<sup>112</sup> Id para 6.114.

<sup>113</sup> Id rec 45.

<sup>114</sup> See *Pre-trial Diversion Program for Child Sexual Assault offenders* Law Society Journal February 1989 21-24.

**(d) Informal court dress**

4.105 Over and over again commentators suggest that court dress is one of the formalities in court proceedings which intimidate child witnesses.<sup>115</sup> It has as a result become quite common for recommendations to be made that courts dispense with wigs and gowns in cases involving child witnesses.

4.106 In Scotland judicial officers have a discretion to alter proceedings to reduce the potentially intimidating atmosphere of a formal court setting, and, according to one commentator, the practice is for judges to doff judicial robes and gowns when the occasion seems to call for it.<sup>116</sup>

4.107 Despite the popular trend, the assumption that wigs and gowns are in themselves a source of intimidation deserves closer examination. There is no empirical evidence that children in general find that removal of the robes and wigs makes any difference, and it is equally possible that it is the child's inability to understand what is happening, or some other feature of the proceedings, that is disturbing to the child's equilibrium. For many people uniforms are re-assuring, and it may be that the "uniforms" will make clear to a child witness who is a court official and who is not. Moreover, where a child abused by an adult male has developed a fear of adult men, who predominate in court proceedings, there may be merit in formal dress which reduces the similarity between the legal personnel and the alleged abuser. Much will depend on the individual child witness and the preparation he or she is given for the proceedings.

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<sup>115</sup> Sheriff B Kearney *The Evidence of Children - The Scottish Dimension*, Paper delivered at *Children's Evidence in Legal Proceedings - An International Conference* held at Selwyn College, Cambridge, England, June 1989.

<sup>116</sup> See for instance Law Reform Commissioner of Tasmania, Draft Report on *Child Witnesses* (1989) 29.

## **Chapter 5**

### **OTHER VULNERABLE WITNESSES**

5.1 The Commission's reference requires it to consider the position of not only children, but also "other vulnerable witnesses".

5.2 The terms of reference invite consideration of three issues:

- (i) Who are "other vulnerable witnesses"?
- (ii) What problems confront these witnesses?
- (iii) What reforms of law and practice are desirable to accommodate these witnesses?

#### **1. WHO ARE "OTHER VULNERABLE WITNESSES"?**

5.3 Presumably the phrase "other vulnerable witness" could include anyone who is a competent witness for whom the giving of evidence is likely to be especially traumatic, or even impossible. A number of possibilities spring to mind. Most obvious, perhaps, are the victims of violent sexual or physical assaults, but also mentioned as potentially vulnerable classes of witness have been the elderly and the mentally handicapped,<sup>1</sup> and people disadvantaged as a result of "cultural differences".<sup>2</sup>

5.4 A difficulty with identifying and selecting certain classes of witness as vulnerable by definition is that this may be experienced as either patronizing or discriminatory. Any competent adult witness is ordinarily entitled to be treated in the same way as anyone else in similar circumstances. This is the basis of anti-discrimination legislation. Thus it appears necessary to look to other criteria to identify vulnerable witnesses. The possible criteria which suggest themselves are:

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<sup>1</sup> Scottish Law Commission *The Evidence of Children and Other Potentially Vulnerable Witnesses* (DP No 75 1988) para 6.1.

<sup>2</sup> *Evidence Act 1977* (Qld) s 21A(1)(b).

- (a) the type of legal proceeding in which the witness is appearing (eg cases of sexual or serious physical assault);
- (b) the individual witness's mental or physical condition;
- (c) the individual witness's ability (or inability) to give evidence in the normal way, for whatever reason (including cultural or personality factors).

5.5 Without research evidence to show that particular types of legal proceedings invariably create special emotional trauma for witnesses which impairs their ability to give evidence, it would seem ill-advised to make broad changes to accommodate all witnesses in any class or kind of proceedings. Instead it may be preferable to grant courts the discretion to allow a particular witness in special circumstances the benefits of certain alternative procedures.

## **2. WHAT PROBLEMS CONFRONT THESE WITNESSES AND WHAT REFORMS ARE NECESSARY?**

5.6 There is no empirical evidence to identify particular problems experienced by "other vulnerable witnesses". Of course, competent adult witnesses are no longer affected by special discriminatory rules requiring corroboration of their evidence, and the competency rules do not exclude any adult from giving evidence. Thus the problems we are concerned about here are essentially those which relate to the manner in which evidence is taken.

5.7 If a witness is identified as "vulnerable" by reference to the likelihood of severe emotional trauma from the experience of giving evidence, then the modifications designed to reduce the trauma in children ought, for humane reasons, to be extended to such a witness. So too, if the witness is identified as vulnerable because of the likelihood that he or she will be unable to give reliable evidence in the normal manner. There seems no reason to refuse such a witness the benefits of a closed-circuit television system or of a support person, for instance.

5.8 In Queensland, the only Australian jurisdiction which has so far made special provision for witnesses other than children (called "special witnesses" in the legislation), a "special witness" will be permitted all the benefits that are applicable to young children. This is achieved by defining a "special witness" as including a child under the age of 12 and:

"a person, who in the court's opinion -

- (i) would, as a result of intellectual impairment or cultural differences, be likely to be disadvantaged as a witness;
- (ii) would be likely to suffer severe emotional trauma; or
- (iii) would be likely to be so intimidated as to be disadvantaged as a witness,

if required to give evidence in accordance with the usual rules and practice of the court".<sup>3</sup>

The Queensland courts are given a discretion to use any alternative procedures from a list which includes the use of screens or closed-circuit television; the excluding of the public from proceedings; the provision of a support person; and the use of video-recorded evidence in place of direct testimony from the witness.<sup>4</sup>

5.9 The most important, and least controversial, alterations to proceedings for the benefit of other vulnerable witnesses would seem to be:

- (i) the use of closed-circuit television where the witness feels unable to give evidence in the presence of a party to proceedings or in the intimidating atmosphere of a courtroom; and
- (ii) the presence of a support person of the witness's choice during the giving of evidence.

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<sup>3</sup> *Evidence Act 1971* (Qld) s 21A(1)(b).

<sup>4</sup> *Id* s 21A(2).

## **Chapter 6**

### **POSSIBLE REFORMS IN WESTERN AUSTRALIA**

6.1 The Commission welcomes comment, with reasons where appropriate, on any matters arising out of this discussion paper and, in particular, on the proposals set out below. Though the paper puts forward proposals instead of open-ended questions, this is not to be taken as an indication that these proposals represent the Commission's firm views, or that it is not open to suggestions for reform different in design or substance from these proposals.

#### **1. COMPETENCY OF CHILD WITNESSES AND CORROBORATION OF THEIR UNSWORN EVIDENCE**

6.2 The Commission invites comment on a proposal to repeal section 101 of the *Evidence Act 1906* in its entirety, and substitute a new provision, providing that:

- (i) A child of any age should be able to take the oath where the child has a sufficient appreciation of the solemnity of the occasion and the added responsibility to tell the truth which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct.
- (ii) A child who does not wish to take the oath should be entitled to make an affirmation in place of swearing an oath.
- (iii) A child who is not competent to swear an oath or affirm should be able to give unsworn evidence if the court is satisfied that the child has reached a stage of cognitive development where his or her evidence, although not on oath or affirmation, may be of assistance to the court.
- (iv) The requirement of corroboration of the unsworn evidence of a child should be eliminated.
- (v) There should be no requirement that a judge warn a jury of the danger of convicting on the uncorroborated evidence (whether sworn or unsworn) of a

young child, although the judge should retain a discretion to comment, where he or she deems appropriate, on the manner in which the evidence was taken.

*This proposal is directed towards ensuring that*

- (i) *there are no obstacles placed in the way of a court's receiving the evidence of a child where this may be of assistance to the court; and*
- (ii) *a court's assessment of the truth and reliability of a child's evidence does not depend on the child's religious beliefs.*

## **2. AMENDING THE HEARSAY RULES**

6.3 The Commission invites comment on the following proposals:

- (i) An out-of-court statement (whether oral, written or electronically recorded) by a child complainant under the age of 16 at the time of the proceedings in a case involving a sexual offence or intra-familial assault or abuse should be admissible in evidence in any proceedings and may substitute for the child's oral testimony provided that:
  - (a) notice of the statement and its contents have been served on the opposing party;
  - (b) in the case of a video-recorded statement or interview, an opportunity has been given to the opposing party to view the video-tape before the proceedings and object to any otherwise inadmissible portions of the tape, which may on the direction of the presiding judge or magistrate at a special pre-trial hearing on the mode of giving evidence be excised from the video tape; and
  - (c) at a trial (as opposed to a preliminary hearing) the child witness is available for such further questioning and cross-examination as the presiding judge allows.

- (ii) If a court is satisfied by the evidence of a medical practitioner that the attendance of a child witness in a sexual offence case would be injurious or dangerous to the child's health, then the court should be empowered under an amended section 108 of the *Evidence Act 1906* to receive in evidence a deposition of the child as if the child were dangerously ill and unable to travel and unlikely to recover and the case should be proceeded with and determined in the absence of the child.
  
- (iii) Where an out-of-court statement by a child complainant is introduced at a preliminary hearing in place of the child's oral testimony the presiding magistrate shall not permit the child to be called unless the magistrate is of the view that, because of the special and extraordinary circumstances of the case, he would be unable to reach a conclusion whether or not to commit the matter for trial without the assistance likely to be provided by the child's oral answers to particular questions. This rule should extend to the situation where a child gives evidence by deposition under section 108 of the Evidence Act.

*These proposals are aimed at providing not only that wherever possible all relevant evidence is available in court proceedings, but also that abused children are not unnecessarily subjected to the further trauma of being examined and cross-examined twice in court proceedings with all the attendant distress. This is sought to be achieved by enabling an abused child ordinarily go give evidence by way of videotaped interview or statement at a preliminary hearing without cross-examination, and to give evidence-in-chief at a trial by videotaped interview or statement with a limited right of cross-examination and re-examination. In exceptional circumstances (where perhaps a child is in a state of nervous collapse) the child's evidence may be taken by deposition under section 108 of the Evidence Act 1906 and admitted into evidence without any appearance of the child at either the preliminary hearing or the trial, but this would require medical evidence as to the child's state of health.*

### **3. MAKING IT EASIER FOR CHILDREN TO GIVE EVIDENCE**

6.4 The Commission invites comment on the following proposals:

- (i) In all cases involving sexual offences or intra-familial assaults or abuse, witnesses who are children under the age of 16 should be permitted to give their evidence and be cross-examined in the absence of the alleged perpetrator, who should be permitted to observe proceedings from another room by means of closed-circuit television while the child is giving evidence.
- (ii) The use of the closed-circuit television procedure should be routine and, since it is aimed at protection of the child witness, departed from only on application of counsel responsible for calling the child witness or some other person on behalf of the child witness.
- (iii) Where counsel on behalf of the child witness seeks a departure from the routine use of the closed-circuit television procedure, that departure may involve either of the following options:
  - (a) that no special procedures should apply; or
  - (b) that the child witness should be permitted to give evidence and be cross-examined by closed-circuit television from another room while the alleged perpetrator remains in court;
- (iv) Where the closed-circuit television procedure is used the judge should be required to inform the jury that the procedure is routine and that no inference as to the accused's guilt should be drawn from its use.
- (v) In cases of sexual offences or intra-familial assaults against children, an unrepresented accused should be permitted to cross-examine a child witness only through an intermediary approved by the court.

*These proposals are directed to*

- (i) *respecting wherever possible children's dignity and right to decide questions concerning their own welfare; and*
- (ii) *minimising the disruption to the normal court procedure, while facilitating the use of closed-circuit television to eliminate the element of confrontation between a child witness and an accused who is a family member alleged to have abused the child.*

*The proposal for an intermediary raises the question of whether an intermediary must necessarily be a legal practitioner and, if so, whether that imports an additional obligation to supply counsel for any accused, whether through the offices of the Legal Aid Commission or otherwise.*

#### **4. SUPPORT FOR CHILD WITNESSES**

6.5 The Commission invites comment on a proposal that legislative provision should be made granting a child witness under the age of 16 the right to have a support person, approved by the court and chosen by or otherwise acceptable to the child, present and seated near to him or her while he or she is giving evidence, subject only to the requirement that the support person should not be a person to be called as a witness in the same proceedings.

*This proposal is directed to reducing the trauma of a court appearance for a child witness by ensuring that he or she is accompanied at all times by a familiar adult with whom the child is comfortable and whose presence will be helpful to the child if he or she feels unduly stressed. It is also directed to enabling children to give evidence despite the difficulty of doing so.*

#### **5. PREPARATION OF CHILD WITNESSES**

6.6 The Commission invites comment on the following proposals:

- (i) An officer of the court should be appointed with appropriate skills and training to prepare child witnesses for the giving of evidence, and no child should be permitted to give evidence at a trial without the court's being satisfied that the

opportunity for appropriate preparation where appropriate to the child has been given. Such preparation should include -

- (a) an explanation of the significance of an oath;
  - (b) a visit to the courtroom in which the proceedings will take place;
  - (c) an explanation of the child's role in the proceedings and the roles of the various officers of the court, including the judge, jury and counsel;
  - (d) a description of the "uniforms" which the judicial officer, counsel and others will be wearing at the trial.
  - (e) an opportunity to understand the sorts of questions that may be asked of the child in the witness stand.
- (ii) The same officer should, where appropriate, be present at the trial and have the duty of explaining to the child after the proceedings or at any adjournment, what is happening or what the outcome is of the proceedings. The duty to explain the outcome of proceedings should where necessary (such as in a criminal case where the child is a complainant) extend after the child has given his or her evidence until the proceedings are complete and any alleged perpetrator has been discharged, acquitted or convicted.

*These proposals are not intended to be a substitute for any psychological preparation for court which may be provided to an individual child by a social worker, psychologist or other qualified person. They are directed only to ensuring that a child witness does not go to court entirely unprepared as to the nature of the legal proceedings and does not suffer from either lack of information or misinformation about the progress and outcome of the proceedings.*

## **6. INFORMAL COURT DRESS**

6.7 The Commission invites comment on a proposal that, until reliable evidence is available that formal court dress is on its own an intimidatory factor influencing the quality of a child's evidence, no change should be made to the normal rules.

*This proposal is based on the assumption that there is good reason for adopting formal court dress and that normal procedures should be adhered to out of respect for children unless they are clearly inappropriate.*

## **7. EDUCATING LEGAL PERSONNEL**

6.8 The Commission invites comment on the following proposals:

- (i) A written guide for legal personnel in dealing with child witnesses should be developed.
- (ii) Practice Directions should be issued to magistrates and judges concerning appropriate procedures and terminology for dealing with child witnesses.

*These proposals are directed to assisting lawyers, judges and other court personnel to ensure that child witnesses are treated in a manner appropriate to their age and level of development and maturity. Such treatment seeks not only to reduce stress for child witnesses; it aims also to enhance the quality of children's evidence.*

## **8. EXCLUDING THE PUBLIC**

6.9 The Commission invites comment on the proposal that whether members of the public should be excluded from the court while a child gives evidence should remain a matter for the court's discretion, the presumption being that in the ordinary way an accused is tried in open court.

*This proposal is directed to the preservation of normal civil liberties for accused persons inherent in the notion of a public trial, but with the acknowledgment that in exceptional*

*circumstances a departure from normal rules is acceptable. Such "emergency measures" should not, however, be routine.*

## **9. OTHER VULNERABLE WITNESSES**

6.10 The Commission invites comment on the following proposals:

- (i) Certain alternative procedures should be available to witnesses (other than children under the age of 16) who are identified as "special witnesses".
- (ii) A "special witness" should be defined as "a person who, taking into account:
  - (a) the person's
    - age
    - mental or physical condition
    - cultural background
    - relationship to any other party to the proceedings;
  - (b) the nature of the proceedings; and
  - (c) any other relevant factor

would in the court's opinion be likely either:

- \* to suffer unusual emotional trauma from giving evidence in the normal manner;  
or
  - \* to be so intimidated or stressed as to be unable to give effective evidence.
- (iii) The alternative procedures available to a "special witness" should include as a minimum:

- (a) the removal of an accused from the courtroom during the giving of evidence by the special witness and the use of closed-circuit television to allow the accused to observe the proceedings; or  
  
allowing the special witness to give evidence and be cross-examined by closed-circuit television from another room while all other parties to the proceedings remain in the courtroom;
- (b) the right to have a support person of his or her choice present and seated near to him or her while he or she is giving the evidence, subject only to the requirement that the support person should not be a person to be called as a witness in the same proceedings;
- (c) appropriate preparation for the experience of giving evidence by an officer of the court.

*These proposals are designed to allow a court, in its discretion, to declare a witness a person to whom special provisions for the giving of evidence ought to apply. General rules are not seen to be appropriate to define who, other than children, are vulnerable witnesses requiring special protection nor what special protections should apply. Those decisions should belong to the court in each case.*

## **10. PRE-TRIAL HEARING ON MODE OF TAKING EVIDENCE**

6.11 The following proposal is dependent on the adoption of some or all of the Commission's earlier proposals. The Commission invites comment on a proposal that whenever in a trial it is intended that evidence will be given by children under the age of 16 or other persons who may be considered vulnerable witnesses and a departure from normal procedures is sought by any party, then a pre-trial hearing under the supervision of the trial judge (or, in the case of a preliminary hearing, the magistrate) should be held at which the following issues will be settled:

- (i) The decision on any application to declare any witness a "special witness"

*(See paragraph 6.10).*

- (ii) If any written or electronically recorded out-of-court statement is to be introduced, then appropriate access to the statement by the opposing party should be arranged (in the case of a written statement, a copy of the statement; in the case of a videotape, an opportunity to view the tape and object to any otherwise inadmissible portions of the tape, which may on the direction of the presiding judge be excised from the tape.

*(See paragraph 6.3(i))*

- (iii) If a video-tape of evidence is to be introduced at the proceedings, then notice should be given of this intention and a decision made as to whether any child witness will be required to be available at the hearing for further questioning.

*(See paragraphs 6.3(i)(c) and 6.3(iii))*

- (iv) If a child's evidence is to be given by way of deposition under section 108 of the *Evidence Act 1906*, then the presiding judicial officer should decide what, if any, limitations on cross-examination are to apply when the deposition is taken.

*(See paragraph 6.3(ii) and (iii))*

- (v) If a child witness in a case involving a sexual offence or intra-familial assault or abuse would ordinarily be examined in the absence of the alleged perpetrator (who would view the proceedings by closed circuit television from another room), then any departure from that procedure if required should be sought and ruled on.

*(See paragraph 6.4(ii) and (iii))*

- (vi) If an accused in such a case is unrepresented, then arrangements should be made for the appointment of a suitable intermediary to relay the accused's questions to the child or other vulnerable witness.

*(See paragraph 6.4(v))*

- (vii) If a child or other vulnerable witness is to give evidence then the identity of an appropriate support person should be settled.

*(See paragraph 6.5)*

- (viii) Where appropriate a date should be arranged for the child or other vulnerable witness to visit the court and be prepared for the hearing by an appropriate officer of the court.

*(See paragraph 6.6(i))*

- (ix) If any party or the trial judge seeks to exclude the public from the trial, then wherever possible the decision as to who should be permitted to remain should be made at this stage.

*(See paragraph 6.9)*

*This proposal is directed to ensuring that all parties (including children and other special witnesses) are able to be prepared appropriately for the trial.*